In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-815

RAMON R. APPAWORA,

Appellant,

v.

MYRON BROUGH,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

JURISDICTIONAL STATEMENT

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APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

JURISDICTIONAL STATEMENT

Appellant appeals from a decision of the Utah Supreme Court rendered August 17, 1976 (Petition for Rehearing denied September 20, 1976), affirming an Order of the Fourth Judicial District Court of Uintah County, State of Utah, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The decision of the Supreme Court of the State of Utah from which this appeal is taken is reported in 553 P.2d 934 (1976). A copy of the Court's opinion is appended hereto as Appendix A. The Order of the Supreme Court of the State of Utah denying a Petition for Rehearing is not reported and is appended hereto as Appendix B. The Order of the Fourth Judicial District Court of Uintah County, State of Utah, denying Appellant's Motion to Set Aside Default and Default Judgment and to Dismiss, from which the appeal to the Utah Supreme Court was taken, is not reported and is appended hereto as Appendix C.

JURISDICTION

This action arose in a county district court in the State of Utah. A default money judgment was entered against appellant Appawora, an enrolled member of the Ute Indian Tribe, who thereafter made timely motions to set aside the judgment and to dismiss the action on grounds that the court lacked jurisdiction over both appellant and the subject matter of the action. The Order denying these motions was appealed to the Utah Supreme Court which affirmed the Order in an opinion filed August 17, 1976. The Utah Supreme Court denied a Petition for Rehearing on September 20, 1976. The Notice of Appeal to this court was filed on October 13, 1976, with the Fourth Judicial District Court of Uintah County, State of Utah. (Appendix K).

The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by 28 U.S.C. §1257(1) (62 Stat. 929). The following decisions sustain the jurisdiction of the Supreme Court to review the Utah judgment on direct appeal in this case: *Wissner v. Wissner*, 338 U.S. 655 (1950), and *Flournoy v. Wiener*, 321 U.S. 253 (1944).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Commerce Clause of the Constitution of the United States (Article I, Section 8, Clause 3), and the Due Process Clause of the fourteenth amendment are set forth in Appendix D. Sections 1321 through 1326 (82 Stat. 78-80), of Title 25 U.S.C. are set forth in Appendix E. Section 667 (68 Stat. 868), of Title 25 U.S.C. is set forth in Appendix F. The Act of Congress of March 11, 1948 (62 Stat. 72), is set forth in Appendix G. Sections 9 through 18 of Title 63, Chapter 36, Utah Code Annotated, 1953, are set forth in Appendix H. Although not asserted to have been invalidated, the Act of Congress of May 27, 1902 (32 Stat. 245, 264), and the Presidential Proclamation of July 14, 1905 (34 Stat. 3119), relied on by the Utah Supreme Court below are set forth in Appendix I and Appendix J respectively.

QUESTIONS PRESENTED

1. Where appellant has asserted rights under 25

U.S.C. §§1321-1326, are these statutes in contravention of the Due Process Clause of the United States Constitution?

2. Where the Ute Indian Tribe of the Uintah and Ouray Reservation has never, by tribal consent election or otherwise, accepted Utah State civil or criminal jurisdiction as required by 25 U.S.C. §1326, do the courts of the State of Utah have jurisdiction to entertain a civil action brought by a non-Indian against an enrolled member of the Ute Indian Tribe arising out of an accident occurring within the exterior boundaries of the Tribe's reservation?

3. Where the Utah Supreme Court has declared that the Congressionally recognized Ute Indian Tribe no longer exists and that the members of the Tribe no longer have an interest in their reservation lands or immunities resulting therefrom, has it improperly invalidated the numerous Acts of Congress and the opinion of this Court which recognize the continued existence of the Ute Indian Tribe and its Uintah and Ouray Reservation?

4. Where appellant has asserted his right under 25 U.S.C. §§1321-1326, and Sections 63-36-9 through 18, Utah Code Annotated, 1953, to have this action heard in tribal court, does the decision of the Utah Supreme Court deny him his right to due process of law?

STATEMENT

This action arose in a county district court in the

State of Utah. Plaintiff-appellee, Myron Brough, a non-Indian, filed a civil action against defendant-appellant, Ramon R. Appawora, an enrolled member of the federally-recognized Ute Indian Tribe of the Uintah and Ouray Reservation, to recover damages allaged to have resulted from an automobile accident occurring on a road within the exterior boundaries of the Indian reservation on which appellant resides. Appawora was served with process by a county deputy sheriff within the exterior boundaries of that reservation but failed to respond thereto. A default judgment in the amount of $28,833.00 was entered against the appellant Indian on September 9, 1975. Thereafter, Appawora obtained counsel and made a timely motion to the county district court to set aside the default judgment and to dismiss the action on the grounds that the county district court lacked jurisdiction over both himself and the subject matter of the action, and that the judgment entered was, therefore, void.

Affidavits submitted to the county district court with this motion established the following facts, which were never contested before that court:

(1) That Appawora is an enrolled member of the Ute Indian Tribe of the Uintah and Ouray Reservation, and that his residence is at Randlett, Utah. (Record, p. 18, 19).

(2) That Randlett, Utah, the place of Appawora's residence and the place where the state process was served on him, is located entirely within the exterior

boundaries of the Uintah and Ouray Reservation. (Record, p. 3, 20).

(3) That the location where the accident in question occurred, "2 miles south of Fort Duchesne, Utah" is also located entirely within the exterior boundaries of the Uintah and Ouray Reservation. (Record, p. 20, 22).

(4) That the Ute Indian Tribe of the Uintah and Ouray Reservation is a federally-recognized Indian tribe exercising powers of self-government within the exterior boundaries of the Uintah and Ouray Reservation. (Record, p. 20).

(5) That the Ute Indian Tribe has a comprehensive Law and Order Code which establishes a Tribal Court having jurisdiction over all civil cases involving enrolled members of the Tribe. (Record, p. 20).

(6) That the Ute Indian Tribe has never accepted Utah State jurisdiction over itself or its members pursuant to 25 U.S.C. §§1322(a) and 1326 (Appendix E) or Sections 63-36-9 through 18, Utah Code Annotated, 1953, (Appendix H), or otherwise granted, ceded or surrendered its jurisdiction to the State of Utah. (Record, p. 21).[1]

Appawora's motion to the county district court was

[1] The facts enumerated in (2) through (6) above were established by affidavit of the Superintendent of the Uintah and Ouray Agency, Bureau of Indian Affairs, U.S. Department of the Interior, located at Fort Duchesne, Utah.

accompanied, in addition to the affidavits referred to above, by a memorandum raising and developing the following points (Record, pp. 8-17):

(1) Lack of subject matter jurisdiction, over a reservation Indian for a cause of action arising on his reservation, citing numerous authorities including 25 U.S.C. §§1321-1326, *Williams v. Lee*, 358 U.S. 217 (1959), *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), and *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971).

(2) Lack of jurisdiction over the person — ineffectiveness of state process on an Indian on his reservation.

The Order of the county district court dated December 12, 1975, (Appendix C) recites that the motion decided was made on the grounds of lack of jurisdiction over both the defendant and the subject matter, and denies the motion.

Appellant Appawora perfected a timely appeal in the Utah Supreme Court from the Order of the county district court refusing to set aside the judgment and to dismiss the action. Appawora there presented and developed the issue of lack of personal and subject matter jurisdiction over a reservation Indian to the Utah Supreme Court by both his briefs and arguments. The Supreme Court affirmed the Order in an opinion filed August 17, 1976, from which two members of the five-member Court dissented (Appendix A).

Appawora thereafter filed a timely Petition for Rehearing with the Utah Supreme Court which was denied without comment (Appendix B). Included with the Petition for Rehearing was a brief pointing out to the Utah Supreme Court the numerous Congressional statutes and other authorities which support the conclusions that both the Ute Tribe and its reservation continue to exist, as well as the decision of this Court which had expressly upheld the requirement for a tribal consent election as a precondition to state jurisdiction under 25 U.S.C. §§1322(a) and 1326. See ***Kennerly v. District Court***, 400 U.S. 423 (1971).

A Notice of Appeal to this Court was filed in the Fourth Judicial District Court for Uintah County, Utah, on October 13, 1976.

The State of Utah had, in 1971, enacted legislation (Sections 63-36-9 to 63-36-17, Utah Code Annotated, 1953; appended hereto as Appendix H), to implement Subchapter III of the so-called "Indian Civil Rights Act" which provided for state assumption of jurisdiction over criminal and civil actions on Indian reservations. See 25 U.S.C. §§1321 to 1326 (Appendix E).

The record before the Utah Supreme Court contained uncontradicted evidence that the Ute Indian Tribe of the Uintah and Ouray Reservation, of which Appawora is an enrolled member, is a federally-recognized Indian tribe and that it has *never*, by tribal consent election or otherwise, accepted Utah State civil or criminal jurisdiction as required by 25 U.S.C. §1326

(Record, pp. 20-21). The issues of the existence of the Ute Indian Tribe and the continuing existence of the Uintah and Ouray Reservation were not raised in the trial court.

The Utah Supreme Court's majority opinion, in which three members of that Court concurred and from which two members dissented, affirmed the Order of the county district court in refusing to dismiss the action for lack of both personal and subject matter jurisdiction (Appendix A). The majority opinion disposes of the case on the following bases:

1. Regarding appellant's assertion of his right to have the matter heard in tribal court in confromity with rights accorded by 25 U.S.C. §1322(a) and 25 U.S.C. §1326, the Utah Supreme Court stated:

> To declare the law to be as claimed by the appellant would be to abandon all forms of due process and permit an enrolled Indian to commit crimes or torts at will and be immune from any accountability to the law of the land. Any statute or court decision which would prevent an enrolled Indian from being tried under the law of the land for a tort or crime committed by that Indian would be in contravention of the due process clause of the Constitution.
>
> To permit an Indian . . . to claim the sanctuary of the tribal method of procedure is unthinkable.

2. With reference to the jurisdiction of the courts of Utah to entertain a civil action against an enrolled member of a federally-recognized Indian tribe based upon events occurring within the exterior boundaries

of the Uintah and Ouray Reservation, the Court ruled:

> Some 25 years ago, the Ute Indians got a judgment against the United States government for the money which it had received from the sale of reservation land lying in the State of Colorado. . . . By this judgment, and the satisfaction thereof, the Indians lost all rights which the or their ancestors ever had in or to the land not theretofore allocated [sic] to them. No longer can an Indian migrant carry about him a protecting mantle which makes him immune to the law of the land so long as he does not stray beyond the snowcapped mountains to the north and south of the Duchesne drainage basin. (Appendix A).

3. With reference to the continuing existence or non-existence of the Ute Indian Tribe and the Uintah and Ouray Reservation and the question of privileges and immunities of enrolled members of the Tribe, the Utah Court ruled:

> The Ute nation of the long ago treaty, no longer exists, and the descendants of the inhabitants of that nation are now citizens of the United States. . . . For a long time, Indians have claimed that they were not treated as citizens of this country. Now that they are citizens of the United States, some of them are unwilling to accept the responsibilities and duties which go with the privilege of citizenship. (Appendix A).

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal are of utmost importance to appellant, to all members of the Ute Tribe, to all other similarly-situated Indians, and to

the United States. The opinion of the Utah Supreme Court ignores or nullifies rights accorded tribal members by Federal Statute, disenfranchises the members of the Ute Tribe, and abolishes their Congressionally-recognized reservation. These questions are substantial and merit plenary consideration. The reasons for requesting such consideration areas follows:

I. THE INVALIDITY OF 25 U.S.C. §§1322(a) AND 1326.

The Utah Supreme Court was confronted with both federal (25 U.S.C. §§1322(a) and 1326) (Appendix E) and Utah State statutes (§63-36-10, Utah Code Annotated, 1953) (Appendix H) which made the obtaining of tribal consent through a special tribal election a necessary condition precedent to the exercise by Utah State courts of civil jurisdiction over a reservation Indian for a cause of action arising on that Indian's reservation. It is undisputed that such a special election was not held and that the Ute Indian Tribe never granted, ceded or surrendered jurisdiction to the State of Utah as required by these statutes.

Appawora presented to the Utah Court the holding of this Court in the case of *Kennerly v. District Court*, 400 U.S. 423 (1971), which established the mandatory nature of the special election requirement, even in a situation in which the governing body of a tribe attempts to cede such jurisdiction to a state, but fails to follow

the statutory requirements.[2]

Also before the Utah Court was the holding of this Court in the case of *Williams v. Lee*, 358 U.S. 217 (1959), which denied to the courts of the State of Arizona subject matter jurisdiction over a civil cause of action arising on the Navajo reservation in Arizona in a situation also involving a non-Indian plaintiff and an Indian defendant.[3]

Notwithstanding these authorities, the Utah Supreme Court majority opinion's response was as follows:

> Any statute or court decision which would prevent an enrolled Indian from being tried under the law of the land for a tort or crime committed by that Indian would be in contravention of the due process clause of the Constitution. (Appendix A), 553 P.2d 934, 936.

Such a holding, declaring the invalidity of federal statutes and disregarding the opinions of this Court, presents a case both within the express language of 28 U.S.C. §1257(1) and substantial in its impact so as to require plenary consideration. The Utah Court's majority opinion implies that Utah State law is the only

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[2] This holding has been re-emphasized in this Court's recent per curiam decision in the case of **Fisher v. District Court**, 44 U.S.L. Week 3490 (U.S. Mar. 1, 1976).

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[3] The evidence before the Utah Court, as in **Williams**, was that the Ute Indian Tribe had a functioning Tribal Court empowered to hear all civil actions involving enrolled members of the Ute Tribe. This Court has reaffirmed the holding of **Williams** that "the authority of tribal courts could extend over non-Indians insofar as concerned their transactions on a reservation with Indians." **United States v. Mazurie**, 419 U.S. 544, 558 (1975).

"law of the land." This conclusion by the Utah Supreme Court presents a wholly appropriate situation for this Court to assume jurisdiction and reaffirm both the enactments of Congress, which this Court has previously upheld, and the integrity of its own prior decisions.

II. THE JURISDICTION OF THE UTAH COURTS.

A. FEDERAL AUTHORITY AND TRIBAL SOVEREIGNTY PREEMPT THE EXERCISE OF STATE JURISDICTION.

The appropriateness of looking to Federal law in any case involving an Indian on his reservation stems from the express reservation of authority by the U.S. Constitution to the Congress, "To regulate commerce with foreign nations, and among the several states, and *with the Indian tribes.*" Article I, Section 8, Clause 3, U.S. Constitution. See *e.g.*, *Williams v. Lee*, 358 U.S. 217, 219, n.4 (1959), and *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172, n.7 (1973).

This Court has held that:

> It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property. The guardianship arises from their condition of tutelage or dependency; and it rests with Congress to determine when the relationship shall cease; the mere grant of rights of citizenship not being sufficient to terminate it. *Winton v. Amos*, 255 U.S. 373, 391-2 (1921).

It is equally well established that:

> When Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress. *United States v. Celestine*, 215 U.S. 278, 285 (1909).

See also *Seymour v. Superintendent*, 368 U.S. 351 (1962), *Mattz v. Arnett*, 412 U.S. 481 (1973), and *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

The leading case denying state courts jurisdiction over reservation Indians for a civil cause of action arising in the Indian's reservation is *William v. Lee*, 358 U.S. 217 (1959). There this Court reversed a decision of the Supreme Court of Arizona which had held that Arizona courts had jurisdiction of a civil suit against reservation Indians for goods sold to them by a non-Indian operating a store on the reservation, stating:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. ***The cases of this court have consistently guarded the authority of Indian governments over their reservations. 358 U.S. at 223.

The doctrine of *Williams v. Lee* in a situation such as this case presents has been strengthened since it was pronounced in 1959. This Court has consistently held that the sole means by which a state can acquire civil

jurisdiction over reservation Indians for cause of action arising on the reservation is by following the requirements of 25 U.S.C. §1321, *et seq*. As reaffirmed in *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 180 (1973):

> Appellee cites us to no cases holding that this legislation may be ignored simply because tribal self government has not been infringed. On the contrary, this court expressly rejected such a position only two years ago. [*Kennerly v. District Court*, 440 U.S. 423 (1971), see infra.] [4]

The right enunciated in *Williams v. Lee* is a right which must be viewed from the perspective of the individual Indian himself, rather than from the tribal point of view. The right is that of the individual Indian to have the tribal court of his reservation hear and decide cases against the Indian arising on the reservation. The Navajo Tribe, as a Tribe, had no more interest in the debt which was the subject matter of *Williams*, than does the Ute Tribe in the auto accident which is the precipitating event herein. This Court in *Williams v. Lee* denied jurisdiction to the Arizona state courts because they did not have jurisdiction, whether a distinct tribal interest in the transaction was involved or not.

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[4] The footnote following this statement states:
Indeed, the position was expressly rejected in Williams, itself, upon which appellee so heavily relies. Williams held that **"absent governing Acts of Congress**, the question has always been whether the state action, infringed on the right of reservation Indians to make their own laws and be ruled by them." [Citation] 411 U.S. at 180, n. 21,
[Emphasis the Court's].

It is submitted that the plenary power of Congress exercised in its trustee relationship to American Indians has so pervaded the field of Indian affairs so as to completely preempt the state from encroachment into reservation matters, except upon such condition as the Congress itself may dictate.

B. THE COURTS OF THE STATE OF UTAH CAN EXERCISE NO JURISDICTION HEREIN WITHOUT TRIBAL CONSENT.

In 1968 the Congress of the United States authorized the states to assume jurisdiction over Indian country[5] provided both the state and the tribe consent to such jurisdiction. (See 25 U.S.C. §1322(a)) (Appendix E).

In response to this federal law, the Utah State Legislature in 1971 enacted Sections 63-36-9 through 63-36-17, U.C.A., 1953 (Appendix H).[6]

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[5] The term "Indian Country" is used in both the federal and state statutes and is defined, in part, by 18 U.S.C. §1151 as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation. . . ." This Court has held that this definition applies to questions of both civil and criminal jurisdiction. See **DeCoteau v. District County Court**, 420 U.S. 425, 427, n. 2 (1975). The Utah Legislature, in 1973, defined the term "Indian reservation" by the use of similar language. See Section 63-36-18, U.C.A., 1953 (Appendix H).

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[6] Specifically, Section 63-36-9, U.C.A., 1953, provides:

> The state of Utah hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, country and lands or any portion thereof within this state in accordance with the consent of the United States given by the act of April 11, 1968, 82 Stat. 78-80 (Public Law 284, 90th Congress), to the extent authorized by the act and this act.

The federal act and Utah implementing legislation establish necessary conditions precedent before the assumption of jurisdiction will be effective. Both 25 U.S.C. §1326 and Section 63-36-10, U.C.A., 1953, require that a tribal consent election be held before state jurisdiction may be applied to the reservation and its Indian residents. 25 U.S.C. §1326 sets forth the requirement as follows:

> State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. . . . (Appendix E).

Section 63-36-10, U.C.A., 1953, in conformity with the federal statute, provides as follows:

> State jurisdiction acquired or retroceded pursuant to this act with respect to criminal offenses or civil causes of action shall be applicable in Indian country only where the enrolled Indians residing within the affected area of such Indian country accept state jurisdiction or request its retrocession by a majority vote of the adult Indians voting at a special election held for that purpose. . . . (Appendix H).

As indicated in the Statement of Facts, the uncontradicted evidence before the county district court was:

> That the Ute Indian Tribe of the Uintah and Oura Reservation, has never accepted Utah State Jurisdiction over itself or its members pursuant to

> 25 U.S.C. Sections 1321-1326 or Section 63-36-9 through 18, U.C.A., 1953, or otherwise granted, ceded or surrendered its jurisdiction to the State of Utah. (Record, p. 21)[7]

Absent such acceptance of jurisdiction, the district court could neither assume nor exercise jurisdiction over defendant, an enrolled reservation Indian, for a cause of action arising on his reservation.

The mandatory nature of the requirement of a tribal election as a precondition to state assumption of jurisdiction over Indians on their reservation is explicitly set forth in *Kennerly v. District Court of Montana*, 440 U.S. 423 (1971). There a suit was commenced in a Montana state court against members of the Blackfeet Tribe to recover a debt arising from the purchase of groceries in a store in Browning, Montana, a town incorporated under Montana law, but located within the exterior boundaries of the Blackfeet Reservation. In 1967, the Blackfeet Tribal Council had passed a resolution apparently giving the Montana state courts concurrent jurisdiction over suits against members of the Tribe. The Montana trial and supreme courts upheld jurisdiction over the Indians.

This Court vacated the judgment solely because

[7] Section 63-36-13, U.C.A., 1953, further deals with the subject of "civil jurisdiction" and states as follows:

> The state of Utah shall assume jurisdiction over civil causes of action as set forth in this act, between Indians or to which Indians are parties in the lands described in each tribal resolution sixty days after issuance of the governor's proclamation to the same extent it has jurisdiction over civil causes of action as elsewhere within the state. . . . [Emphasis added] (Appendix H).

the procedures specified in 25 U.S.C. §1326 had not been followed and held that, notwithstanding the consent of the Tribal Council, the State of Montana could not assume or exercise its court jurisdiction over the Blackfeet. In the present case, not only is a tribal consent election absent, but there has never been any attempt by the Ute Tribal Business Committee to cede or grant jurisdiction to the State of Utah.

III. THE INVALIDITY OF VARIOUS ACTS OF CONGRESS RECOGNIZING THE CONTINUING EXISTENCE OF THE UINTAH AND OURAY INDIAN RESERVATION AND THE UTE INDIAN TRIBE.

The complicated question of the status of the Ute Tribe's Uintah and Ouray Reservation was neither briefed nor argued to the Utah Supreme Court before its opinion was issued.[8] Despite this lack of an adversary presentation of these issues, that Court disposed of the case by ruling that neither the Ute Tribe nor the Uintah and Ouray Reservation now exists and that, as a result, appellant cannot assert any special status as an enrolled reservation Indian.

The Utah Supreme Court's majority opinion demonstrates at best only a negligible review of the relevant statutes and legislative history upon which these issues

[8] Appawora did brief these questions in his Brief accompanying the Petition for Rehearing to the Utah Supreme Court.

are grounded. The opinion cites but two of several dozen relevant statutory references to find a restoration of the Uintah and Ouray Reservation to "the public domain."[9]

The Utah Court reasons that the Ute Tribe's Uintah and Ouray Reservation in Utah has been terminated as a result of a claims judgment paid to certain Ute Indians for the loss of a reservation once occupied in the State of Colorado.[10] Thereafter the Court concludes, on the basis of the evidence just recited, that the Ute Indian Tribe's reservation was terminated and that such a conclusion is fully supported by this Court's decision in the case of *DeCoteau v. District Court*, 420 U.S. 425 (1975).

Such a conclusion completely ignores the principles of statutory construction for reservation status cases set

[9] The first of such references (Appendix A, n.1), is to a Presidential Proclamation of July 14, 1905 (34 Stat. 3119; appended hereto as Appendix I), which opened the Uintah portion of the reservation to homesteading under an Act of Congress, not even cited, and which expressly did not, contrary to the Utah Court's statement, place unallotted lands "back on the public domain."

The second statutory reference (Appendix A, n. 2), is to an Act of Congress dated May 27, 1902 (32 Stat. at 264; appended hereto as Appendix J), which the Utah Court indicates made an appropriation "to pay for the land thus transferred." An examination of this Act reveals that the only appropriation it makes to the Ute Indians is to pay two bands of Ute Indians for lands used for purposes of making allotments to a third band of Ute Indians settled on their reservation. (All three of these bands now comprise the Ute Indian Tribe under an Indian Reorganization Act (25 U.S.C. §476; 48 Stat. 987) Constitution and Bylaws.)

[10] See Appendix A, the paragraph containing n. 3.

forth in the *DeCoteau* opinion and invalidates, *sub silentio*, the various acts of Congress expressly recognizing the Ute Tribe's Reservation subsequent to the statutory references made in the opinion. The *DeCoteau* opinion summarizes these principles for such cases as follows:

> This Court does not lightly conclude that an Indian reservation has been terminated. "[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." . . . The congressional intent must be clear, to overcome "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" . . . Accordingly, the Court requires that the "congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." . . . In particular, we have stressed that reservation status may survive the mere opening of a reservation to settlement, even when the monevs paid for the land by the settlers are placed in trust by the Government for the Indians' benefit. 420 U.S. 425, 444.

The Utah Supreme Court, in attempting to take judicial notice of reservation status, has failed to discover, or refused to consider, the bulk of the Congressional enactments,[11] both prior to and subsequent to the

[11] See e.g.:
Treaty of December 30, 1849 (9 Stat. 984); Act of May 5, 1864 (13 Stat. 63); Act of February 23, 1865 (13 Stat. 432); Treaty of March 2, 1868 (15 Stat. 619); Act of June 15, 1880 (21 Stat. 199); Executive Order of January 5, 1882 (I Kapper 901);

(Continued on next page)

time of the events cited in the Court's opinion, which evidence compels the conclusion that the Ute Indian Tribe and its Uintah and Ouray Reservation continue to exist to this day. Illustrative of these authorities are the following:

Forty-three years after the events recited by the Utah Supreme Court's majority opinion, Congress, on March 11, 1948, passed an Act adding a substantial area to the Uintah and Ouray Reservation. This Act (62 Stat. 72; Appendix G), commences with the following language:

> Be it enacted . . . , That the exterior boundary of the Uintah and Ouray Reservation in Grand and Uintah Counties, in the State of Utah, for the benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation, is hereby extended to include the following area: [legal description follows.]

This Act does not establish the reservation; it extends the existing exterior reservation boundaries, and it does

(Continued from page 21)

Act of August 15, 1894 (28 Stat. 286, 337); Proclamation of February 22, 1897 (29 Stat. 895); Act of June 7, 1897 (30 Stat. 62, 87); Act of June 4, 1898 (30 State. 429); Act of March 1, 1899 (30 Stat. 924, 940-41); Act of May 27, 1902 (32 Stat. 245, 263); Joint Resolution of June 19, 1902 (32 Stat. 744); Act of March 3, 1903 (32 Stat. 982, 997); Act of April 21, 1904 (33 Stat. 189, 207-08); Act of March 3, 1905 (33 Stat. 1048, 1069); Proclamation of July 14, 1905 (34 Stat. 3116); Proclamation of July 14, 1905 (34 Stat. 3119); Proclamation of August 2, 1905 (34 Stat. 3140); Act of April 30, 1908 (35 Stat. 70, 95); Executive Order of May 17, 1921; Secretarial Order of August 25, 1945 (10 Fed. Reg. 12409); Act of March 11, 1948 (62 Stat. 72); Act of March 16, 1950 (64 Stat. 19); Act of July 14, 1956 (70 Stat. 546); Act of August 2, 1956 (70 Stat. 936); Act of September 18, 1970 (84 Stat. 843).

so for the benefit of the existing Ute Indian Tribe of the Uintah and Ouray Reservation.

On August 27, 1954, Congress passed an Act distributing a portion of the Ute Tribe's assets to the so-called "mixed blood" members of the Tribe, and thereafter terminated federal supervision over the property so distributed (68 Stat. 868; 25 U.S.C. §677 *et seq;* Appendix F). The property not so distributed remained with the Ute Indian Tribe, under federal supervision, for the benefit of the Tribe and the non-terminated "full-blood" members of the Tribe.

In subsequent litigation arising out of the handling of the "mixed-blood" members' assets, this Court observed:

> There is, and can be, no dispute that the United States holds title to the land, including the mineral interest, constituting the Uintah and Ouray Reservation. *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 141 (1972).[12]

Since both Congress and this Court have expressly recognized the continuing existence of the Ute Tribe and its Uintah and Ouray Reservation subsequent to the events which the Utah Supreme Court majority finds resulted in a termination of those entities, substantial questions exist not only regarding the validity of the Utah Court's interpretation of federal law, but concerning the proper forum and means by which that federal law is to be construed. A comparison of the

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[12] This opinion also contains numerous references to the Ute Tribe itself.

Utah Court's opinion herein with the meticulous examination of the legislative record which this Court has required in prior reservation termination cases (see e.g., this Court's *DeCoteau* opinions), indicates that these substantial issues of federal law have not been fully considered by the Utah Supreme Court.

IV. APPAWORA'S RIGHT TO DUE PROCESS OF LAW.

The Utah Court's opinion itself denies Appawora his right to due process of law in at least two ways: (1) The opinion denies him the right to have this action heard in tribal court, the only forum having jurisdiction under both state and federal law; and (2) It further denies him this right without ever having given him notice or an opportunity to be heard on the issue upon which the majority opinion is based.

The case of *Williams v. Lee*, 358 U.S. 217 (1959), denied to the courts of the State of Arizona any civil jurisdiction over a reservation Indian for a cause of action arising on the Indian's reservation. Like the instant case, that case involved a non-Indian plaintiff. This Court recognized the defendant Indian's right to have the action heard in his tribal court and there stated:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the *right of*

> *the Indians to govern themselves.* . . . Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it. [Citation] 358 U.S. at 223. (Emphasis added.)

As indicated in II A above, this Court has previously held that this right in individual Indians is not dependent upon a showing of an infringement of tribal self-government. See *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 180 (1973).

Not only has the Utah Supreme Court taken this right away, it has taken it away by deciding this case on an issue not argued, briefed or raised by the pleadings or in the county court below. Appawora's due process rights have been violated both because of the arbitrary nature of the decision and because he was given neither notice of the surprise nature of the decision nor an opportunity to be heard thereon.

CONCLUSION

The decision of the Utah Supreme Court has altered the jurisdictional status quo on the Uintah and Ouray Reservation. As a result, tribal members are now subjected to the jurisdiction of the courts of the State of Utah. The implications of such a decision cannot be minimized. Substantial questions are presented,

jurisdiction exists and the resolution of these questions requires plenary consideration by this Court.

Respectfully Submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF UTAH

Myron Brough,
Plaintiff and Respondent,

v.

Ramon R. Appawora,
Defendant and Appellant.

No. 14434

FILED
August 17, 1976

Allan E. Mecham, Clerk

ELLETT, Justice:

The defendant appeals from a decision of the District Court of Uintah County declining to set aside a default judgment entered on behalf of the plaintiff on September 9, 1975. The plaintiff, a non-Indian, obtained a judgment by default for the sum of $28,800 general and special damages, together with costs of court. On or about October 22, 1975, defendant, an enrolled member of the Ute Indian Tribe, appeared specially and moved the court to set aside the default

judgment and dismiss the action on the basis that the court lacked jurisdiction over the defendant and the subject matter. The court denied the motion and the defendant is here seeking a reversal.

The automobile accident out of which this action arose occurred on November 12, 1974, on a county road in Uintah County approximately two miles south of Fort Duchesne, Utah. The defendant claims that the reservation on which he lives encompasses all the land within the "drainage of the Duchesne River from the snowcapped mountains on the north to the snowcapped mountains on the south." This area of land includes numerous cities and towns and thousands of acres of land owned and occupied by non-Indians.

The sole question presented on this appeal is whether or not the district courts of the State of Utah have jurisdiction over enrolled members of the Ute Indian tribe within the area drained by the Duchesne River and its tributaries.

The government of the United States formerly warred with the various Indian tribes and as a means of preventing further bloodshed, entered into treaties of peace with the ancestors of this defendant whereby certain lands were set apart for their use. With the advance of civilization and the increase in population, it was considered advisable for certain areas of the land to be sold. The Indians were granted specific lands chosen by themselves and the remaining land was sold to the government with a proviso that the money re-

ceived from the sale thereof would be held in trust for the benefit of the Indians.

In 1905 President Theodore Roosevelt, by proclamation dated July 14, placed the land of the Indian reservation not theretofore allotted to Indians back on the public domain.[1] Congress appropriated funds to pay for the land thus transferred, and the Indians accepted the money.[2]

Some 25 years ago, the Ute Indians got a judgment against the United States government for the money which it had received from the sale of the reservation land lying in the State of Colorado.[3] That judgment totaled $31,938,473.43. The basis of their suit against the government was that they had an interest in the land in the nature of a lien to secure the payment to the Ute tribes of the money received by the government for the land which had been taken back into the public domain and sold to the public. By this judgment, and the satisfaction thereof, the Indians lost all rights which they or their ancestors ever had in or to the land not theretofore allocated to them. No longer can an Indian migrant carry about him a protecting mantle which makes him immune to the law of the land so long as he does not stray beyond the snowcapped moun-

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[1] 34 Statutes at Large, 3119 (1905).

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[2] 32 Statutes at Large, 264.

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[3] The Confederated Bands of Ute Indians v. The United States, 120 Ct. Clms., 609 (1951). See also 100 Ct. Clms. 413 (1943); 112 Ct. Clms, 123 (1948).

taiins to the north and south of the Duchesne drainage basin.

A treaty can only exist between independent, sovereign powers.[4] Several generations ago the United States government entered into a so-called treaty of peace with the nation of Ute Indians. The United States Supreme Court in DeCoteau v. District County Court[5] said that since that time, the government "has altered its general policy toward the Indian tribes". Further, the court stated: "After 1871, the tribes were no longer regarded as sovereign nations, and the government began to regulate their affairs through statute or through contractual agreements ratified by statute."[6]

The Ute nation, of the long-ago treaty, no longer exists, and the descendants of the inhabitants of that nation are now citizens of the United States. When a nation ceases to exist, its treaties are no longer of any force or effect,[7] and the descendants of those who constituted the erstwhile nation cannot thereafter claim any benefits under the treaty. For a long time, Indians have claimed that they were not treated as citizens of this country. Now that they are citizens of the United States, some of them are unwilling to accept the re-

[4] 87 C.J.S. § 1 Treaties).

[5] 420 U.S. 425, 43 L.Ed.2d 300, 95 S. Ct. 1082; 211 N.W.2d 843 (So. Dak. 1973).

[6] Id

[7] 74 Am. Jur. 2d § 12 (Treaties).

sponsibilities and duties which go with the privilege of citizenship.

In the case of DeCoteau v. District Court, supra, the question was presented as to whether or not the state court had jurisdiction of Indians within the confines of an original grant to the Indian tribe. There, as in the instant matter, the government had reduced the original reservation by the land not allocated to the Indians and had paid the tribe therefor. The South Dakota Supreme Court held that the land, within the boundaries of the original treaty, which had been purchased by the government and subsequently sold to white men, as was done in this case, was no longer "Indian Country" and that the state courts had jurisdiction over Indians therein. This ruling was affirmed by the Supreme Court of the United States in March, 1975.[8]

To declare the law to be as claimed by the appellant would be to abandon all forms of due process and permit an enrolled Indian to commit crimes or torts at will and be immune from an accountability to the law of the land. Any statute or court decision which would prevent an enrolled Indian from being tried under the law of the land for a tort or crime committed by that Indian would be in contravention of the due process clause of the Constitution.

To permit an Indian who commits a murder in any of the various towns in the drainage area of the Duchesne River to show disdain for the prosecuting offic-

[8] 420 U.S. 425.

ials and claim the sanctuary of the tribal method of procedure is unthinkable.

The judgment of the trial court was correct and it is affirmed. Costs are awarded to the respondent.

I Concur:

J. Allan Crockett, Justice

HENRIOD, Justice, concurs in the result.

TUCKETT, Justice: (Dissenting)

I respectfully dissent.

An affidavit of the superintendent of the Uintah and Ouray Agency of the Bureau of Indian Affairs, Fort Duchesne, discloses that the place where the accident occurred was located entirely within the exterior boundaries of the Uintah and Ouray Reservation. The affidavit further discloses that the Ute Indian Tribe is a federally recognized tribe exercising the powers of government within the boundaries of the reservation. A tribal court has been established by the Ute Indian Tribe which has jurisdiction over all civil cases involving enrolled members of the tribe. The sole question presnted on appeal is whether or not the District Court of Uintah County had jurisdiction to entertain and to determine the controversy which arose on the tribal reservation and in which an enrolled Indian of the Ute Tribe was a party defendant.

Under federal statutes "Indian country" is defined as follows:

> . . . the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities with the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

While 18 U.S.C., Sec. 1151, above quoted, on its face only deals with criminal jurisdiction it has been recognized that it generally applies as well to questions of civil jurisdiction.[1] Title 25, Sec. 1322, is a grant of power by Congress to the states pertaining to jurisdiction by the states over civil causes in which Indians are parties. That section is in the following language:

> The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such

[1] De Coteau v. District County Court 420 U.S. 425, 95 S. Ct. 1082, 43 L.Ed. 2d 300; McClanahan v. Arizona Tax Com. 411 U.S. 164, 36 L.Ed. 129, 93 S.Ct. 1257; U.S. v. Celestine 215 U.S. 278.

> civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

Section 1326, Title 25, deals with the process by which the State may acquire jurisdiction. That section is in the following language:

> State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other government body, or by 20 per centum of such enrolled adults.

Pursuant to the acts of Congress above set forth, in 1971 the Utah Legislature adopted two statutes pertaining to the subject. Section 63-36-9, U.C.A. 1953, as amended, provides as follows:

> The state of Utah hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, country and lands or any portion thereof within this state in accordance with the consent of the United States

> given by the act of April 11, 1968. . . .

Section 63-36-10, which is also pertinent here, is in the following language:

> State jurisdiction acquired or retroceded pursuant to this act with respect to criminal offenses or civil causes of action shall be applicable in Indian country only where the enrolled Indians residing within the affected area of such Indian country accept state jurisdiction or request its retrocession by a majority vote of the adult Indians voting at a special election held for that purpose. All special elections shall be called pursuant to federal law.[2]

The Ute Indian Tribe of the Uintah and Ouray reservation have not accepted state jurisdiction by a majority vote of the adult enrolled Indians residing within the reservation. The Indian reservation having been established by Congress, only the Congress could terminate the reservation or change its status.

The definition of "Indian reservation" as defined by Section 63-36-18, U.C.A. 1953, as amended, indi-

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[2] Art. III, Constitution of Utah provides: "Second:-The people inhabiting this State do affirm and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries hereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . ."

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[3] Gourneau v. Smith (N.D.) 207 N.W.2d 256; Kennerly v. Dist. Court of Ninth Jud. Dist. of Montana 400 U.S. 423, 27 L.Ed.2d 507, 91 S. Ct. 480.

cates that rights of way running through the reservation are part of the reservation.[3]

I am of the opinion that the district court was without jurisdiction.

MAUGHAN, Justice, concurs in the views expressed in the dissenting opinion of Mr. Justice Tuckett.

APPENDIX B

SUPREME COURT OF UTAH

STATE OF UTAH
Salt Lake City, Utah
September 20, 1976

Office of the Clerk

Boyden, Kennedy, Romney & Howard
Attorneys at Law

1000 Kennecott Building
Salt Lake City, Utah 84133

Attention: Scott C. Pugsley, Esq.

Myron Brough,

Plaintiff and Respondent,

v.

Ramon R. Appyawora,

Defendant and Appellant.

No. 14434

This day petition for rehearing denied. Case remitted to Uintah County.

Allan E. Mecham, Clerk

APPENDIX C

IN THE DISTRICT COURT OF
UINTAH COUNTY

STATE OF UTAH

MYRON BROUGH, *Plaintiff,* v. RAMON R. APPAWORA, *Defendant.*	ORDER Civil No. 7648

The above-entitled case came on for hearing on the motion of the Ute Indian Tribe to set aside the default judgment against defendant and to dismiss plaintiff's cause of action on the grounds of lack of jurisdiction over the defendant and over the subject matter, the Court having heard argument of counsel and being fully appraised in the premises,

NOW, THEREFORE, IT IS ORDERED that the motions on file herein to vacate the judgment are herewith denied.

DATED this 12th day of December, 1975.

BY THE COURT:

Allen B. Sorensen
District Judge

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing Order was mailed, postage prepaid, to Mr. Scott C. Pugsley, Attorney for Defendant, 1000 Kennecott Building, 10 East South Temple, Salt Lake City, Utah 84133, this 12th day of December, 1975.

/s /Robert M. McRae

APPENDIX D

CONSTITUTIONAL PROVISIONS

The Commerce Clause (Art. I, Sec 8,. cl. 3):

"The Congress shall have Power . . . to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

The Due Process Clause (Amend. XIV, § 1):

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

APPENDIX E

25 U.S.C. §§1321-1326 (82 Stat. 78-80).

SUBCHAPTER III.—JURISDICTION OVER CRIMINAL AND CIVIL ACTIONS

25 U.S.C. § 1321. Assumption by State of criminal jurisdiction—Consent of United States; force and effect of criminal laws

(a) The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or an part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal law of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

Alienation, encumbrance, taxation, and use of property; hunting, trapping, or fishing

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or per-

sonal property, including water rights, belonging to any Indian or any Indian tribe, band, or communty that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

25 U.S.C. § 1322. Assumption by State of civil jurisdiction—Consent of United States; force and effect of civil laws

a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

Alienation, encumbrance, taxation, use, and probate of property

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or its subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or satute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

Force and effect of tribal ordinances or customs

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

25 U.S.C. § 1323. Retrocession of jurisdiction by State

(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such

State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 587), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

25 U.S.C. § 1324. Amendment of State constitutions or statutes to remove legal impediment; effective date

Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

25 U.S.C. § 1325. Abatement of actions

(a) No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States pursuant to this subchapter shall abate by reason of that

cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.

(b) No cession made by the United States under this subchapter shall deprive any court of the United States of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such cession. If the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purposes of any such criminal action, such cession shall take effect on the day following the date of final determination of such action.

25 U.S.C. § 1326. Special election

State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

APPENDIX F

25 U.S.C. §§ 677-677aa (68 Stat. 868 et seq)

UTE INDIANS OF UTAH: DISTRIBUTION OF ASSETS BETWEEN MIXED-BLOOD MEMBERS; TERMNATION OF FEDERAL SUPERVISION OVER PROPERTY OF MIXED-BLOOD MEMBERS

25 U.S.C. § 677 Purpose

The purpose of sections 677-677aa of this title is to provide for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members thereof; for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe; and for a development program for the full-blood members thereof, to assist them in preparing for termination of Federal supervision over their property.

[25 U.S.C. §§ 677a to 677aa omitted]

APPENDIX G

Act of March 11, 1938 (62 Stat. 72.)

AN ACT

To define the exterior boundary of the Uintah and Ouray Indian Reservation in the State of Utah, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the exterior boundary of the Uintah and Ouray Reservation in Grand and Uintah Counties, in the State of Utah, for the benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation, is hereby extended to include the following area: [legal description omitted]

Sec. 2. The Secretary of the Interior is hereby authorized and directed to revoke the order dated September 26, 1933, temporarily withdrawing in aid of legislation certain lands in the former Uncompahgre Indian Reservation.

Sec. 3. The State of Utah may relinquish to the United States for the benefit of the Indians of the said Ute Reservation such tracts of school or other State-owned lands, surveyed or unsurveyed, within the said reserved area, as it may see fit, reserving to said State, if it so desires, such rights as it may possess to any minerals underlying such State lands as may be relinquished

and said State shall have the right to make selections in lieu thereof outside of the area hereby withdrawn, equal in value, as determined by the Secretary of the Interior, to the lands relinquish, from the vacant, unappropriated, nonmineral public lands, within the State of Utah, such lieu selections to be made in the manner provided in the enabling Act pertaining to said State, except as to the payment of fees or commissions, which are hereby waived. The value of improvements owned by the State on lands relinquished to the United States for the benefit of said Indians shall be taken into consideration and full credit in the form of lands shall be allowed therefor. Any funds now or hereafter on deposit in the United States Treasury to the credit of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, are hereby made available, and with the consent of the Uintah and Ouray Tribal Business Committee, may be expended for the purchase of privately owned and State-owned lands, including the improvements thereon, and improvements heretofore placed on public lands, together with water rights and water holes, within said boundary. The title to lands purchased under this authorization may, in the discretion of the Secretary of the Interior, be taken for the surface only. Title to any lands and rights acquired hereunder shall be taken in the name of the United States in trust for the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, and such lands or rights shall be exempt from State or local taxation.

Sec. 4 In any suit now pending or hereafter brought against the United States by the Ute Indian

Tribe of the Uintah and Ouray Reservation, or by any one or more of the separate bands comprising said Ute Indian Tribe of the Uintah and Ouray Reservation, in the Court of Claims, the Indian Claims Commission or before any other tribunal, the United States may claim, as an offset against any judgment recovered therein, the fair market value as of the date of this Act of any interest in public lands conveyed by section 1 hereof, and any improvements thereon, and the fair market value as of the date of the transfer of title of the lands and improvements which may be relinquished by the State of Utah to the United States under section 3 of this Act. The validity and amount of any such claim shall be determined by the court, commission, or tribunal in conformity with the provisions of section 2 of the Act of August 13, 1946 (60 Stat. 1049, 1050).

APPENDIX H

Sections 9-18, Title 63, Chapter 36, Utah Code Annotated, 1953.

§ 63-36-9. Assumption by state of criminal and civil jurisdiction over Indians and Indian territory.—The state of Utah hereby obligates and binds itself to assume criminal an dcivil jurisdiction over Indians and Indian territory, country and lands or any portion thereof with this state in accordance with the consent of the United States given by the act of April 11, 1968, 82 Stat. 78-80 (Public Law 284, 90th Congress), to the extent authorized by the act and this act.

§ 63-36-10. Special elections on acceptance or retrocession of state jurisdiction.—State jurisdiction acquired or retroceded pursuant to this act with respect to criminal offenses or civil causes of action shall be applicable in Indian country only where the enrolled Indians residing within the affected area of such Indian country accept state jurisdiction or request its retrocession by a majority vote of the adult Indians voting at a special election held for that purpose. All special elections shall be called pursuant to federal law.

§ 63-36-11. Acceptance or rejection of cession of state jurisdiction—Proclamation by governor.—Whenever the governor receives a resolution signed by the majority of any tribe, tribal council or other governing body duly recognized by the Bureau of Indian Affairs

of any tribe, community, band or group in the state certifying the results of a special election expressly ceding criminal and/or civil jurisdiction of the Indian tribe, community, band or group or its lands or any portion thereof to the state of Utah within the limits authorized by federal law, he shall either accept or reject the cession of jurisdiction within sixty days. If the governor accepts jurisdiction, he shall issue a proclamation within sixty days to the effect that civil and/or criminal jurisdiction shall apply, subject to the limitations of this act, to all Indians and all Indian territory, county, lands or any portion thereof of the Indian body invoved to the extent authorized by the resolution. Failure to issue the proclamation within the time prescribed is deemed a rejection of the assumption of jurisdiction.

§ 63-36-12. Criminal jurisdiction.—The state of Utah shall assume jurisdiction over offenses as set forth in this act, committed by or against Indians in the lands described in each tribal resolution sixty days after issuance of the governor's proclamation to the same extent it has jurisdiction over offenses committed elsewhere within the state. The criminal laws of the state shall have the same force and effect within such lands as they have elsewhere within the state.

§ 63-36-13. Civil jurisdiction.—The state of Utah shall assume jurisdiction over civil causes of action as set forth in this act, between Indians or to which Indians are parties in the lands described in each tribal resolution sixty days after issuance of the governor's proclamation to the same extent it has jurisdiction over

civil causes of action as elsewhere within the state. The civil laws of the state shall have the same force and effect within such lands as they have elsewhere within the state, except as otherwise provided by this act.

§ 63-36-14. State jurisdiction subject to provisions of federal law and resolution of tribe.—The jurisdiction assumed pursuant to this act is subject to the limitations and provisions of the federal act of April 11, 1968, 82 Stat. 78-80 (Public Law 284, 90th Congress), and the specific limitations set forth in each resolution ceding jurisdiction to the state, both as to geographical area and subject matter.

§ 63-36-15. Retrocession of state jurisdiction—Proclamation by governor.—The state of Utah hereby obligates and binds itself to retrocede all or any measure of the criminal or civil jurisdiction acquired by it pursuant to this act whenever the governor receives a resolution from a majority of any tribe, tribal council or other governing body duly recognized by the Bureau of Indian Affairs of any Indian tribe, community, band or group in this state, certifying the results of a special election and expressly requesting the state to retrocede jurisdiction over its people or lands or any portion thereof within the limits authorized by the act of April 11, 1968, 82 Stat. 78-80 (Public Law 284, 90th Congress). The governor shall issue within sixty days a proclamation to the effect that jurisdiction has been retroceded for all such Indians and all Indian territory, country, lands or any portion thereof.

§ 63-36-16. Limitations on state authority with

respect to property and rights of Indians.—Nothing in this act shall authorize the alienation, encumbrance or taxation of any real or personal property, including water rights belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein; or shall enlarge, diminish or deprive any Indian or any Indian tribe, band or community of any right, privilege or immunity afforded under federal treaty, agreement, statute or executive order with respect to Indian land grants, hunting, trapping or fishing or the control, licensing or regulation thereof.

§ 63-36-17. Tribal ordinance or custom given full force and effect.—Any tribal ordinance or custom adopted by an Indian tribe, band or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action.

§ 63-36-18. Criminal jurisdiction of state over hunting, trapping, or fishing offenses on reservations—"Indian reservation" defined.—"Indian reservation" as used in this act means (a) all land within the limits of

any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation, (b) all Indian allotments, to which the Indian titles have not been extinguished, including rights of way, thereon.

APPENDIX I

Act of May 27, 1902 (32 Stat. 245, 263-4).

An Act Making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, ...

That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: *Provided*, That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre: *And provided further*, That nothing herein contained shall impair the rghts of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the

Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential right to locate under the mining laws not to exceed six hundred and forty acres of contiguous mineral land, except the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease; and the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians. And the sum of seventy thousand and sixty-four dollars and forty-eight cents is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid to the Uintah and the White River tribes of Ute Indians, under the direction of the Secretary of the Interior, whenever a majority of the adult male Indians of said tribes shall have consented to the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided.

Said item of seventy thousand and sixty-four dollars and forty-eight cents to be paid to the Uintah and White River Utes covers claims which these Indians have

made on account of the allotment of lands on the Uintah Reservation to Uncompahgre Indians and for which the Government has received from said Uncompahgre Indians money aggregating sixty thousand and sixty-four dollars and forty-eight cents; and the remaining ten thousand dollars claimed by the Indians under an Act of Congress detaching a small part of the reservation on the east and under which Act the proceeds of the sale of the lands were to be applied for the benefit of the Indians.

. . . .

APPENDIX J

Presidential Proclamation of July 14, 1905 (34 Stat. 3119)

By The President of the United States of America
A PROCLAMATION

Whereas, it was provided by the Act of Congress, approved May 27, A.D., 1902 (32 Stat., 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, "shall be restored to the public domain: Provided, That persons entering any of said lands under the homestead laws shall pay therefor at the rate of one dollar and twenty-five cents per acre".

And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the Act of Congress approved March 3, 1903 (32 Stat., 998), and was extended to March 10, 1905, by the Act of Congress approved Apri 21, 1904 (33 Stat., 207), and was again extended to not later than September 1, 1905, by the Act of Congress, approved March 3, 1905 (33 Stat., 1069), which last named act provided, among other things:

That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the Act of Congress of May twenty-seventh, nineteen hundred

and two, shall be disposed of under the general provisions of the homestead and townsite laws of the United Staes, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescrbe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof: and no person shall be permitted to settle upon, occupy or enter any of said lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: Provided. That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish war of Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said Acts of Congress, do hereby declare and make known that all the unallotted lands in said reservation, excepting such as have at that time been reserved for military, forestry and other purposes, and such mineral lands as may have been disposed of under existing laws, will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States: and it is further directed and prescribed that:

Commencing at 9 o'clock a.m. Tuesday, August 1, 1905, and endng at 6 o'clock p.m. Saturday, August 12, 1905, a registration will be had at Vernal, Price and Provo, State of Utah, and at Grand Junction, State of Colorado, for the purpose of ascertaining what persons desire to enter, settle upon, and acquire title to any of said lands under the homestead law, and of ascertaining their qualifications so to do. To obtain registration each applicant will be required to show himself duly qualified, by written application to be made only on a blank form provided by the Commissioner of the General Land Office, to make homestead entry of these lands under existing laws, and to give the registering officer such appropriate matters of description and identity as will protect the applicant and the Government against any attempted impersonation. Registration cannot be effected through the use of the mails or the employment of an agent, excepting that honorably discharged soldiers and sailors entitled to the benefits of section 2304 of the Revised Statutes of the United States, as amended by the act of Congress, approved March 1, 1901 (31 Stat., 847), may present their applications for registration and due proofs of their qualifications through an agent of their own selection, having a duly executed power of attorney on a blank form provided by the Commissioner of the General Land Office, but no person will be permitted to act as agent for more than one such solder or sailor. No person will be permitted to register more than once or in any other than his true name.

Each applicant who shows himself duly qualified will be registered and given a nontransferable certificate

to that effect, which will entitle him to go upon and examine the lands to be opened hereunder; but the only purpose for which he can go upon and examine said lands is that of enabling him later on, as herein provided, to understandingly select the lands for which he may make entry. No one will be permitted to make settlement upon any of said lands in advance of the opening herein provided for, and during the first sixty days following said opening no one but registered applicants will be permitted to make homestead settlement upon any of said lands and then only in pursuance of a homestead entry duly allowed by the local land officers, or of a soldier's declaratory statement duly accepted by such officers.

The order in which, during the first sixty days following the opening, the registered applicants will be permitted to make homestead entry of the lands opened hereunder, will be determined by a drawing for the district publicly held at Provo, Utah, commencing at 9 o'clock a.m., Thursday, August 17, 1905, and continuing for such period as may be necessary to complete the same. The drawing will be had under the supervision and immediate observance of a committee of three persons whose integrity is such as to make their control of the drawing a guaranty of its fairness. The members of this committee will be appointed by the Secretary of the Interior, who will prescribe suitable compensation for their services. Preparatory to this drawing the registration officers will, at the time of registering each applicant who shows himself duly qualified, make out a card, which must be signed by the applicant, and giving

such a description of the applicant as will enable the local land officers to thereafter identify him. This card will be subsequently sealed in a separate envelope which will bear no other distinguishing label or mark than such as may be necessary to show that it is to go into the drawing. These envelopes will be carefully preserved and remain sealed until opened in the course of the drawing herein provided. When the registration is completed, all of these sealed envelopes will be brought together at the place of drawing and turned over to the committee in charge of the drawing, who, in such manner as in their judgment will be attended with entire fairness and equality of opportunity, shall proceed to draw out and open the separate envelopes and to give to each inclosed card a number in the order in which the envelope containing the same is drawn. The result of the drawing will be certified by the committee to the officers of the district and will determine the order in which the applicants may make homestead entry of said lands and settlement thereon.

Notice of the drawings, stating the name of each applicant and number assigned to him by the drawing, will be posted each day at the place of drawing, and each applicant will be notified of his number, and of the day upon which he must make his entry, by a postal card mailed to him at the address given by him at the time of registration. The result of each day's drawing will also be given to the press to be published as a matter of news. Applications for homestead entry of said lands during the first sixty days following the opening can be made only by registered applicants and

in the order established by the drawing.

Commencing on Monday, August 28, 1905, at 9 o'clock a.m., the applications of those drawing numbers 1 to 50, inclusive, must be presented at the land office in the town of Vernal, Utah, in the land district in which said lands are situated, and will be considered in their numerical order during the first day, and the applications of those drawing numbers 51 to 100, inclusive, must be presented and will be considered in their numerical order during the second day, and so on at that rate until all of said lands subject to entry under the homestead law, and desired thereunder, have been entered. If any applicant fails to appear and present his application for entry when the number assigned to him by the drawing is reached, his right to enter will be passed until after the other applications assigned for that day have been disposed of, when he will be given another opportunity to make entry, failing in which he will be deemed to have abandoned his right to make entry under such drawing.

To obtain the allowance of a homestead entry, each applicant must personally present the certificate of registration theretofore issued to him, together with a regular homestead application and the necessary accompanying proofs, together with the regular land office fees, but an honorary discharged soldier or sailor may file his declaratory statement through his agent, who can represent but one soldier or sailor as in the matter of registration.

Persons who make homestead entry for any of

these lands will be required to pay therefor at the rate of one dollar and twenty-five cents per acre when they make final proof, but no payment, other than the usual fees and commissions will be required at the time the entry is made.

Persons who apply to make entry of these lands prior to October 27, 1905, will not be required to file the usual nonmineral affidavit with their applications to enter, but such affidavit must be filed before final proof is accepted under their entries; but all persons who make entry after that date will be required to file that affidavit with their applications to enter.

The production of the certificate of registration will be dispensed with only upon satisfactory proof of its loss or destruction. If at the time of considering his regular application for entry it appear that an applicant is disqualified from making homestead entry of these lands, his application will be rejected, notwithstanding his prior registration. If any applicant shall register more than once hereunder, or in any other than his true name, or shall transfer his registration certificate, he will thereby lose all the benefits of the registration and drawing herein provided for, and will be precluded from entering or settling upon any of said lands during the first sixty days following said opening.

Any person or persons desiring to found, or to suggest establishing, a townsite upon any of the said lands, at any point, may, at any time before the opening herein provided for, file in the land office a written applica-

tion to that effect, describing by legal subdivisions the lands intended to be affected, and stating fully and under oath the necessity or propriety of founding or establishing a town at that place. The local officers will forthwith transmit said petition to the Commissioner of the General Land Office with their recommendation in the premises. Such Commissioner, if he believes the public interests will be subserved thereby, will, if the Secretary of the Interior approve thereof, issue an order withdrawing the lands described in such petition, or any portion thereof, from homestead entry and settlement and directing that the same be held for the time being for disposal under the townsite laws of the United States in such manner as the Secretary of the Interior may from time to time direct; and, if at any time after such withdrawal has been made it is determined that the lands so withdrawn are not needed for townsite purposes they may be released from such withdrawal and then disposed of under the general provisions of the homestead laws in the manner prescribed herein.

All persons are especially admonished that under the said act of Congress approved March 3, 1905, it is provided that no person shall be permitted to settle upon, occupy, or enter any of said lands except in the manner prescribed in this proclamation until after the expiration of sixty days from the time when the same are opened to settlement and entry. After the expiration of the said period of sixty days, but not before, as hereinbefore prescribed, any of said lands remaining undisposed of may be settled upon, occupied, and entered under the general provisions of the homestead

and townsite laws of the United States in like manner as if the manner of effecting such settlement, occupancy, and entry had not been prescribed herein in obedience to law.

The Secretary of the Interior shall prescribe all needful rules and regulations necessary to carry into full effect the opening herein provided for.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this 14th July, in the year of our Lord 1905, and of the Independence of the United States the one hundred and thirtieth.

[Seal.]

Theodore Roosevelt

By the President:

Alvey A. Adee
Acting Secretary of State

APPENDIX K

FILED
DISTRICT COURT
UINTAH COUNTY, UTAH
October 13, 1976
MORRIS R. COOK, CLERK
By Roena Licht, Deputy

IN THE FOURTH JUDICIAL DISTRICT
COURT OF UINTAH COUNTY
STATE OF UTAH

MYRON BROUGH, *Plaintiff and Appellee,* v. RAMON R. APPAWORA, *Defendant and Appellant.*	Civil No. 7648

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Ramon R. Appawora, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Utah State Supreme Court, affirming the Order of this Court denying Defendant's Motion to Set Aside Default and Default Judgment and to Dismiss, filed by the Utah Supreme Court on August 17, 1976, with a Petition for Rehearing denied by the Utah Supreme Court on September 20, 1976.

28 U.S.C. Section 2403 may be applicable to this appeal.

This appeal is taken pursuant to 28 U.S.C. Section 1257(1).

Dated: October 12, 1976.

Stephen G. Boyden

F. Burton Howard

Scott C. Pugsley
BOYDEN, KENNEDY,
ROMNEY & HOWARD
Attorneys for Appellant
1000 Kennecott Building
Salt Lake City, Utah 84133

CERTIFICATE OF SERVICE

I hereby certify that I mailed a copy of the foregoing Notice of Appeal to the Supreme Court of the United States to Robert M. McRae, Attorney for Appellee Myron Brough, 370 East Fifth South, Salt Lake City, Utah 84111, and to the Solicitor General, Department of Justice, Washington, D.C. 20530, by first class mail, postage prepaid this 12th day of October, 1976.

/s/ Scott C. Pugsley

In the Supreme Court of the United States

OCTOBER TERM, 1976

Docket No. 76-815

RAMON R. APPAWORA,

Appellant,

v.

MYRON BROUGH,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

MOTION TO DISMISS

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Salt Lake City, Utah 84111

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In the Supreme Court of the United States

OCTOBER TERM, 1976

Docket No. 76-815

RAMON R. APPAWORA,

Appellant,

v.

MYRON BROUGH,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

QUESTIONS PRESENTED

1. Where the Utah Supreme Court upheld a default judgment against appellant, did the Utah Supreme Court hold that the Uintah and Ouray Reservations no longer exist?

2. Where appellant has made a general appearance rather than a special appearance, did the District

Court have jurisdiction to hear appellant's case irrespective of appellant's status as an Indian?

STATEMENT

A short statement clarifying appellant's statement is all that is necessary.

Appellant states that the accident occurred within the exterior borders of the Indian reservation. Appellant's statement is based on an affidavit submitted to the District Court. In the two courts below respondent argued and continues to do so here that this affidavit is no more than a conclusion of law and has no foundation in the record except as an opinion. Respondent produced affidavits indicating that the road on which the accident occurred had been built, paid for, and was owned by Duchesne County. The record is void of any right-of-way granted by any Indian tribe to the county or state, yet appellant insisted that such a right-of-way existed.

It is true that appellant was served on the reservation but the deputy sheriff who served the complaint by affidavit alleged that he first secured a court order from a tribal judge granting him permission to serve appellant on the reservation. At trial he would have testified to that effect and would have presented evidence that that was the customary procedure when serving complaints on the reservation.

Appellant's statement with respect to the Utah Supreme Court's decision will be treated in the argument.

ARGUMENT

1. DID THE UTAH SUPREME COURT TERMINATE THE UINTAH AND OURAY RESERVATIONS?

Respondent does not quarrel with appellant's general statements of the law with respect to the termination of tribal reservations. It is much too late in the development of Indian law to seriously argue with appellant's position on that issue in the face of clear and concise declarations by Congress and the United States Supreme Court. Nor does respondent disagree with appellant's interpretation of the pertinent Utah and Federal statutes which require Ute tribal approval through an electoral process before the State of Utah can exercise criminal and civil jurisdiction over tribal members on reservation lands. The pertinent case law and applicable Federal statutes make it quite clear that appellant's position is unassailable. The difficulty with appellant's position is *not* its general legal soundness. The difficulty with appellant's Jurisdictional Statement is that it has no relevance to the factual setting in which this case reaches the Court.

Appellant has very carefully quoted from the Utah Supreme Court decision, *Brough v. Appawora*, Ut., 533 P.2d 934 (1976), attempting to induce one into believing that the Utah Supreme Court completely destroyed every vestige of the Uintah and Ouray Reservations in the State of Utah. Although it is perhaps possible to glean such a holding from a quick and careless reading of the case, appellant's contention is without merit.

Brough, supra, did *not* destroy anything. The case recognizes that a reservation does in fact exist, that almost a century or more ago the reservation contained a great deal more land than it does now and, finally, that the land on which the accident occurred has not been within reservation boundaries for nearly 74 years due to Acts of Congress.

In context, the quotations appellant uses indicate a very *different* holding than what appellant would have this Court believe.

> "The Ute nation, *of the long-ago treaty, no longer exists*, and the descendants of the inhabitants of that nation are now citizens of the United States. When a nation ceases to exist, its treaties are no longer of any force or effect, and the descendants of those who constituted the erstwhile nation cannot thereafter claim any benefits under the treaty. For a long time, Indians have claimed that they were not treated as citizens of this country. Now that they are citizens of the United States, some of them are unwilling to accept the responsibilities and duties which go with the privilege of citizenship.
>
> 'In the case of DeCoteau v. District Court, supra, the question was presented as to whether or not the state court had jurisdiction of Indians *within the confines of an original grant* to the Indian tribe. *There, as in the instant matter*, the government *had reduced the original* reservation *by the land not allocated* to the Indians and had paid the tribe therefor. The South Dakota Supreme Court held that the land, within the boundaries of the original treaty, which had been purchased by the government and subsequently sold

> to white men, *as was done in this case*, was no longer "Indian Country" and that the state courts had jurisdiction over Indians *therein*. This ruling was affirmed by the Supreme Court of the United States in March, 1975.
>
> 'To declare the law to be as claimed by the appellant would be to abandon all forms of due process and permit an enrolled Indian to commit crimes or torts *at will* and be immune from an accountability to the law of the land. Any statute or court decision which would prevent an enrolled Indian from being tried under the law of the land for a tort or crime committed by that Indian would be in contravention of the due process clause of the Constitution.
>
> 'To permit an Indian who commits a murder *in any of the various towns in the drainage area of the Duchesne River* to show disdain for the prosecuting officials and claim the sanctuary of the tribal method of procedure is unthinkable." (Citations omitted)

It is clear from the Utah Supreme Court's use of *DeCoteau v. District County Court*, 420 U.S. 425, 43 L.Ed 2d 300, 95 S. Ct. 1082 (1975) that it was *not* eliminating the Ute reservations. It simply held that an Indian cannot do anything he pleases within the old reservation's boundaries and claim immunity from state jurisdiction. The case holds that if a tribal member wishes to claim immunity, he must claim immunity for actions committed on *tribal* land and not on *state* land.

Appellant's entire premise is faulty, not because it is wrong as a statement of general principals of law

but because *Brough* does not hold for the proposition that appellant contents. Perhaps as a technical matter, appellant's appeal should be denied for that reason alone since appellant is seeking jurisdiction of a question that is not raised by this case, but the *Brough* case is also sound on legal principals and the appeal should be denied on that basis as well.

At Appendices I and J of appellant's Jurisdictional Statement, appellant cites the Act of Congress and Presidential Proclamation which opened portions of the Uintah and Ouray reservations for homesteading whereby the government sold much of the unallocated land to non-Indian settlers. Both documents contain the statement that unallocated lands "shall be restored to the public domain." The original Act of Congress indicates that the allotment and payment of moneys for claims raised by the Ute Indians with respect to lands already allotted to others and the restoration of unallocated land to the public domain was to be done with the consent of a majority of the adult male Indians of the tribes involved. One month after the approval of this Act, on June 19, 1902, (Appendix A, Respondent's Brief) consent was eliminated with respect to the payment of moneys. No document appears acknowledging that the Indians consented, but history clearly indicates that the allotments were made to the tribes and that by Presidential Proclamation the unallocated lands were returned to the public domain, as Appendix J of appellant's Jurisdictional Statement indicates.

For 74 years no one, including the Ute tribes, has questioned the ownership of the unallocated lands. The

lands were sold and treated as the exclusive property of the United States. The United States sold the property giving patent title to tracts which have been treated as fee simple ownership and incorporated cites and body politic counties of the area have treated the land in all respects as their own. Trust deeds were not issued.

The May 27, 1902 Act did not specify how the Indian peoples were to consent, and the Presidential Proclamation of 1905 indicates that the government delayed almost two years before opening the unallocated land. No reason appears in the record for the delay nor why a specific manner of consent was not required. But after 74 years of silence while the various Ute bands were proceeding with claims on other tracts of land, respondent contends that the Indians consented to this Act of Congress. This argument was made to the Utah Supreme Court and Respondent contends that it is still a valid argument.

This case is very similar to *The Confederated Bands of Ute Indians v. The United States*, 100 Ct. Cl. 413 (1943). There the Court of Claims reached the conclusion that the United States and the Ute tribes had *actually reached an agreement* about the tribe's lands in the State of Colorado. On that basis, the government was required to pay the tribes for the land the government confiscated as per the agreement. In the case at bar the Act of 1902 essentially provides for the same remedy. Congress offered to pay for the land. The only difference in the case at bar is that there is no history of an actual agreement between the

parties. Respondent contends, however, that an agreement was reached by silence and acquiescence over a period of seventy-four years and therefore the Ute Tribe should now by laches and estoppel be barred under basic equitable principles.

However, if respondent is incorrect as to the issue of agreement, it is clear that by Presidential Proclamation of 1905 the unallocated lands were in fact returned to the public domain as the very language of the Proclamation states. Clearly, the very purpose of the proclamation was to implement and carry out the purposes of the May 27, 1902 Act of Congress. Furthermore, whether an agreement existed or not the land was taken and sold. In accordance with appellant's own case law, the clear intention of Congress and action of the President was, in fact, to terminate the reservation in the unallocated lands. No case law is presented by appellant requiring that Indians consent to a termination of a reservation or a part of a reservation. All the case law requires is a clear intention of Congress as is clearly pointed out in appellant's brief. Apparently, Congress, under statute and case law, can create a reservation and can dispose of one without the consent of anyone. That statement was never questioned in *The Confederated Band of Ute Indian*, supra. Implicitly the Court of Claims agreed that such was the law, but decided against the government because the government acted as if it did not have complete title.

Once again this case does not involve the issues appellant raised in his Jurisdictional Statement and the appeal should be denied for that reason.

Finally, it should be brought to the Court's attention that a suit is now pending in the United States District Court in the State of Utah, Civil Number C-75-408 entitled *The Ute Indian Tribe v. The State of Utah; Duchesne County; Roosevelt City; Duchesne City*, in which the Ute tribe is seeking a declaratory judgment allowing it to implement tribal laws in the entire old reservation boundaries (See Appendix B). It is apparent that the remedy the tribe is seeking through the same counsel afforded appellant in this case is to have its old land under the original reservation given back to the tribe and that the tribe be allowed to assume jurisdiction of all peoples, towns, establishments, etc., within those old limits, both Indian and non-Indian. Serious and critical questions are to be decided in the U.S. District Court case which will not even be discussed in the case at bar, yet a determination of the issues in this case in the posture in which appellant approaches the Court will prejudice the rights of countless people. Respondent respectfully urges the Court to deny the appellant's petition because that petition does not raise issues that are fairly raised by the circumstances of this case and because the issue is not ripe for determination at this time and should be left to a determination in a case such as that now pending before the U. S. District Court in the State of Utah.

2. DID THE DISTRICT COURT HAVE JURISDICTION OVER APPELLANT?

At page five (5) of appellant's Jurisdictional Statement appellant writes:

> "Thereafter, Appawora obtained counsel and made a timely motion to the county district court to set aside the default judgment and to dismiss the action on the grounds that the county district court lacked jurisdiction over both himself and *the subject matter of the action*, and that the judgment entered was, therefore, void. (Emphasis added.)

Appendix C of respondent's brief also indicates that before the District Court below, appellant moved to dismiss the case on the same grounds. It is a general principle of law that when a party attacks both the in personam *and* subject matter jurisdiction of the court that party has entered a general appearance and not a special appearance. See 31 A.L.R. 2d 268, Section 5 and cases cited therein.

In view of this case law it is clear that irrespective of the determination of the status of the Uintah and Ouray Reservations, appellant, in fact, entered a general appearance and subjected himself to the jurisdiction of the lower court. This argument was raised before both lower courts and respondent contends that it should be dispositive of this case. Since appellant entered a general appearance arguing strenuously before the District Court that it lacked subject matter jurisdiction, appellant cannot now claim immunity as a tribal member and respondent respectfully moves the court to dismiss this appeal.

CONCLUSION

The decision of the Utah Supreme Court did not terminate the Uintah and Ouray Reservations but is

consistent with pertinent case law dealing with Indian problems. Furthermore, appellant entered a general appearance before the District Court and irrespective of the need to determine the boundary lines of the reservations in this case, appellant was subject to the District Court's jurisdiction under the particular circumstances of this case.

Respectfully submitted,

ROBERT M. McRAE
Attorney for Appellee
370 East Fifth South
Salt Lake City, Utah 84111

CERTIFICATE OF MAILING

This is to certify that I mailed two copies of the foregoing Motion by first class mail, postage prepaid, to Scott C. Pugsley of Boyden, Kennedy, Romney & Howard, Attorneys for Appellant, 1000 Kennecott Building, Salt Lake City, Utah 84133, and to the Solicitor General, Department of Justice, Washington, D.C. 20530, this 7th day of February, 1977.

.....

ROBERT M. McRAE

APPENDIX A

ACT OF JUNE 19, 1902 (32 State. 31.)

AN ACT

JOINT RESOLUTION SUPPLEMENTING AND MODIFYING CERTAIN PROVISIONS OF THE INDIAN APPROPRIATION ACT FOR THE YEAR ENDING JUNE THIRTIETH, NINETEEN HUNDRED AND THREE.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the Act "Making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, "are hereby supplemented and modified as follows: . . ."

The item of seventy thousand and sixty-four dollars and forty-eight cents appropriated by the Act which is hereby supplemented and modified, to be paid to the Uintah and White River tribes of Ute Indians in satisfaction of certain claims named in said Act, shall be paid to the Indians entitled thereto without awaiting their action upon the proposed allotment in severalty of lands in that reservation and the restoration of the surplus lands to the public domain.

Approved, June 19, 1902.

APPENDX B

VERNAL EXPRESS/ADVERTISER, PAGE 25

THURSDAY, NOVEMBER 20, 1975

"UTE TRIBE TO TEST LAW CODE RIGHTS IN COURT"

"With feelings running high on both sides, a federal court test is ahead for an Indian tribe's attempt to assert jurisdiction over non-Indian individuals and towns.

Despite tension and resentment raised by the issue, there have been no major incidents.

The area in which the Ute Tribe wants to apply tribal laws includes the towns of Duchesne, Roosevelt, Myton, Neola and Altamont. They have a combined population of about 4,000 and are surrounded by the 1.3 million-acre Uintah and Ouray Indian Reservation.

'We will no longer stand idly by and watch our resources ruined, our people humiliated and our competency questioned,' Tribal Chairman Lester Chapoose has said.

The 1,600-member tribe says if state officials can prosecute Indians who violate state laws off the reservation, the Utes can prosecute non-Indians who violate Ute laws on or affecting the reservation. A tribal code claiming civil and criminal jurisdiction over all lands, including exterior boundaries of the reservation, went into effect September 15.

And Indian tribes in two other states are formulating similar law enforcement plans. In Montana the Blackfeet have drafted an ordinance of their own under which they would arrest and prosecute non-Indians for violations committed on their reservations near Glacier National Park. So far, all the Blackfeet have done is issue two traffic citations.

Similar efforts have been started in Washington State.

State and local officials in Utah say the Utes have no jurisdiction in communities which were carved out of the reservation years ago under homestead and townsite acts. The Indians were paid $32 million for the land in one of the first cases to come before the U.S. Indian Court of Claims after it was established in 1948.

'We will not tolerate a government by nonrepresentation,' State Senator Dan Dennis of Roosevelt said, referring to the tribe's leaders. 'We are guaranteed a representative government by the Fifth Amendment. If we have to, we'll go to Congress and change the law.'

The tribe has not been pressing implementation of some of the code's provisions that are more objectionable to whites because, in the words of one tribal spokesman, 'We feel it's better to exercise restraint in times of stress."

An example is the decision, at least for the time being, not to patrol Roosevelt, Duchesne, Myton or U. S. 40 and make arrests or issue citations. But county

roads connecting Indian communities are patroled by Indian officers.

Other areas in which Indian plans for jurisdiction have raised objections are arrests and prosecution in tribal courts of whites or Indians for criminal matters in which Indians are involved, as well as trying civil matters that meet similar criteria An ordinance in which commercial alcoholic beverage operations would be licensed by the tribe also is expected to become an issues once the tribe completes the ordinance."

APPENDIX C

MYRON BROUGH,

Plaintiff,

vs.

RAMON R. APPAWORA,

Defendant.

SPECIAL APPEARANCE AND MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT AND TO DISMISS

Case No. .....

COMES NOW the Defendant, appearing specially through counsel, and, pursuant to Rules 55(c) and 60(b) of the Utah Rules of Civil Procedure, moves the Court to set aside the default and default judgment entered herein and dismiss Plaintiff's Complaint.

As grounds for this Motion, Defendant states that this Court lacks jurisdiction over both the Defendant and the subject matter and that the judgment herein is therefore void.

A Memorandum and supporting affidavits in support of this Motion are attached hereto.

This Motion shall be handled according to Rule 20 of the Rules of Practice of this Court.

Respectfully submitted this 22nd day of October, 1975.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-815

RAMON R. APPAWORA,

Appellant,

v.

MYRON BROUGH,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF OPPOSING MOTION TO DISMISS

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RAMON R. APPAWORA,

Appellant,

v.

MYRON BROUGH,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF OPPOSING MOTION TO DISMISS

Appellant Appawora submits this Brief in opposition to the Motion to Dismiss filed herein by appellee and in response to the Brief of the State of Utah, Amicus Curiae, in Support of Appellee.

I

The Status of the Ute Tribe's Reservation

The arguments of both Appellee Brough and the State of Utah attempt to convince this Court that the

decision of the Utah Supreme Court was correct in holding that the Indian reservation upon which appellant resides, and within the boundaries of which the accident in question occurred, has been so diminished by Congress as to now include only the tracts of land held in trust for the tribe or its members. Appellant Appawora would again remind this Court that this issue was neither raised, briefed nor argued in the trial court, and was only raised before the Utah Supreme Court in appellant's petition for rehearing after that court had already rendered its decision disestablishing the Ute Reservation. The materials which are now cited have never been presented to the Utah courts in an adversary context.

As noted in the State's amicus brief, the United States District Court for the District of Utah has already ruled in favor of the continuing existence of the original exterior boundaries of the Ute Tribe's reservation and has enjoined the State of Utah from asserting any jurisdiction over Ute Indians based on the Utah Supreme Court's decision herein. Appellant is prepared, at an appropriate time and if necessary to rebut the legislative materials presented in the State's amicus brief and in the Motion to Dismiss, and to demonstrate the continuing existence of the original reservation boundaries. It is precisely because these materials have never been presented in any adversary context herein that review is needed. The presumption in reservation status cases is against either termination or diminishment. See *De Coteau v. District County Court*, 420 U.S. 425, 444 (1975).

II

The Appropriateness of the Appeal

Appellee Brough does not address the issue of the Utah court's declaring unconstitutional certain federal statutes. The State's amicus brief begs the question, under its points II and III, by asserting that the federal statutes in question do not apply since the Ute Tribe's reservation has been terminated or disestablished. The Utah Supreme Court has either taken judicial notice of contested facts regarding the status of the Ute Tribe's reservation, or it has declared unconstitutional those specific federal statutes which deny to the State jurisdiction in "Indian country." Under either characterization, plenary review herein will greatly serve the cause of proper judicial administration as well as resolve important issues of federal Indian law.

III

The Alleged Waiver of the Jurisdictional Defenses

Appellee's point 2 asserts that appellant has somehow waived his jurisdictional defenses by making a special appearance herein. Even assuming, arguendo, that it would be possible for an Indian to waive the personal jurisdictional defense, the decisions of this Court are clear that a state may obtain subject matter jurisdiction over reservation Indians only by complying with 25 U.S.C. §1321 et seq. See *Kennerly v. District Court*, 400 U.S. 423 (1971) and *Fisher v. District Court*, 44 U.S.L. Week 3490 (U.S. Mar. 1, 1976).

Conclusion

Appellant respectfully requests that appellee's Motion to Dismiss be denied and that either the decision of the Utah Supreme Court be summarily reversed (see ***Kennerly v. District Court***, and ***Fisher v. District Court***, both supra), or that this appeal be scheduled for plenary consideration by the Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-815

RAMON R. APPAWORA, *Appellant*,

v.

MYRON BROUGH, *Appellee*.

Appeal from the Supreme Court of the State of Utah

BRIEF OF THE STATE OF UTAH, AMICUS CURIAE, IN SUPPORT OF APPELLEE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-815

RAMON R. APPAWORA, *Appellant,*

v.

MYRON BROUGH, *Appellee.*

Appeal from the Supreme Court of the State of Utah

BRIEF OF THE STATE OF UTAH, AMICUS CURIAE, IN SUPPORT OF APPELLEE

The State of Utah, *amicus curiae,* concurs in and adopts the statement of Opinions Below contained in the Jurisdictional Statement. *Amicus* contests that jurisdiction lies by appeal to this Court, as set forth in Part III of the Argument herein. *Amicus* concurs in and adopts the Statutes and Constitutional Provisions Involved as set forth in the Jurisdictional Statement, except that it contests the relevance of some of the laws included therein, as set forth in Part II of the Argument herein.

STATEMENT

This case reflects a current attempt by the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah to obtain jurisdiction over an area of approximately three million acres that is within the original boundaries of two former reservations which were disestablished around the turn of the century. Appellant is represented by the law firm which has represented the Ute Tribe for decades and presently represents the Tribe in two federal lawsuits against the State of Utah which also advocate the re-establishment of original reservation boundaries.

Because this action arose in the context of a tort action between two private individuals, the State was not a party to the action in the courts below. However, the State has a vital interest in the question presented, and is, as noted, presently a party in two other lawsuits involving the same issue.

The court below ruled that the area in which the automobile accident involved herein had occurred was no longer Indian country and no longer within an Indian reservation because it had been restored to the public domain by an Act of Congress and Presidential Proclamation. Jurisdictional Statement, A3-A5.

In *Ute Indian Tribe* v. *Utah State Tax Commission,* No. 76-1602, decided by the United States District Court for the District of Utah and now pending in the Tenth Circuit Court of Appeals, the issue is whether and to what extent an Indian retailer may be required to collect a state sales tax in the area involved herein. The resolution of that question will require a determi-

nation of whether the area has remained an Indian reservation or whether the reservation was partially disestablished by Congress. See *Moe* v. *Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976).

In *Ute Indian Tribe* v. *State of Utah, et al.,* Civil No. C-75-408, pending in the U.S. District Court, District of Utah, the Tribe seeks a declaratory judgment fixing the boundaries of its reservation, squarely raising the disestablishment question.

The fact that the State is an interested party when reservation status is in question is amply illustrated by the participation of other states in previous cases of this type before this Court. Moreover, the various contexts in which this issue has arisen show that the issue is crucial to the functioning of state government. *DeCoteau* v. *District County Court,* and *United States ex rel. Feather* v. *Erickson,* 420 U.S. 425 (1975) (state neglected and dependent child proceeding and state criminal law); *Mattz* v. *Arnett,* 412 U.S. 481 (1973) (enforcement of state criminal law); *Seymour* v. *Superintendent,* 368 U.S. 351 (1962) (enforcement of state game law). The two pending federal cases noted above in which the State of Utah and the Ute Tribe are parties further illustrate this point.

In addition to the strong governmental interests illustrated by these cases, special needs require that the State take action in the present case. In *Ute Indian Tribe* v. *State Tax Commission,* mentioned above, federal District Judge Willis Ritter did not call for briefs on the question of whether Acts of Congress had disestablished the reservations but simply entered an order that seems to re-establish the original boundaries

of the two original reservations as the present reservation boundaries.

In addition, in *Ute Indian Tribe* v. *State of Utah, et al.,* the case presently in the District Court, Judge Ritter enjoined the State and county defendants from exercising any criminal or civil jurisdiction based upon the decision of the State Supreme Court herein. Thus, by seeking a refund of taxes paid to the State, the Tribe has been able to obtain an order that appears to resurrect the boundaries of two former reservations. And by filing a suit to formally reestablish these original boundaries, the Tribe has been able to enjoin the exercise of State jurisdiction in areas in which it has been consistently exercised for decades.

At the same time, the Tribe, through its newly enacted Law and Order Code, claims full jurisdiction over non-members throughout the area encompassed by the original reservation boundaries. The Tribe asserts jurisdiction over "*any* person residing, located or present within the Reservation," for *any* civil or criminal action. Law and Order Code, § 1-2-3.[1] The disputed area over which the Tribe now asserts this jurisdiction is almost entirely fee land owned by non-Indians and has a population which is over 90% non-Indian.

The State of Utah recognizes that the tracts within the original boundaries of the two original reservations which are still held in trust, either for individual

[1] The recently enacted Law and Order Code of the Tribe not only claims the above noted additional territorial jurisdiction and expanded civil jurisdiction, but also claims complete misdemeanor and felony jurisdiction, including the major crime of criminal homicide The concern and unrest caused by the enactment of this Code is discussed in Appellee's Motion to Dismiss.

Indians or for the Tribe, are Indian country and are subject to exclusive federal and tribal jurisdiction. This is precisely the same situation which exists in the area in question in *DeCoteau, supra.* The State also recognizes the Indian country status of a contiguous tract of approximately 500,000 acres which Congress reserved for exclusive Indian use in 1948. But the State does not concede the Tribe's claim that the present Uintah and Ouray Reservation includes all of the land, both fee patented and trust, within the original boundaries of the former Uintah and Uncompahgre Reservations.

The State of Utah is cognizant of this Court's recognition of a responsibility to protect Indian rights in real reservation situations such as those involved in *Kennerly* v. *District Court of Montana,* 400 U.S. 423 (1971), *McClanahan* v. *Arizona Tax Commission,* 411 U.S. 164 (1973), *Williams* v. *Lee,* 358 U.S. 217 (1959) and other cases. But those situations are much different from the present case in which a tribe seeks to have two former reservations, long regarded as disestablished by Congress, returned to reservation status by court decree. In the above cases, the reservations were never the subject of disestablishment statutes such as are involved here.

QUESTION PRESENTED

Whether the area in which the incident herein occurred, which was within the boundaries of the original Uintah Indian Reservation, is presently still Indian country, or whether acts of Congress disestablished the Uintah Reservation, leaving the area no longer within a reservation boundary and no longer Indian country.

ARGUMENT

I. THE COURT BELOW CORRECTLY HELD THAT THE AREA IN QUESTION IS NO LONGER WITHIN RESERVATION BOUNDARIES

A. The Uintah Reservation Was Expressly Partially Disestablished by Acts of Congress.

With respect to the area in which the incident giving rise to this case occurred, the Utah Supreme Court correctly ruled that the original reservation had been disestablished by Congress. The difference between the area involved and the present Uintah and Ouray Reservation is explained by a history of the area.

Originally, two separate reservations were established in Utah for the bands which now comprise the Ute Indian Tribe. The Act of May 5, 1864, 13 Stat. 63, established the Uintah Reservation in the Uintah Valley for Indians in the Utah Territory. Eighteen years later, an Executive Order established the Uncompahgre Reservation, partially adjacent to the Uintah Reservation, for the Uncompahgre Utes who were being relocated from Colorado. Exec. Ord. of January 5, 1882, 1 Kappler 901.

The two reservations were each partially disestablished. Allotments were made to the Uncompahgres, as contemplated in their relocation treaty,[2] and the surplus lands were opened to settlement by the Act of June 7, 1897, 30 Stat. 62, 87. Subsequent legislation consistently referred to the area as the "former Uncompahgre Reservation."[3]

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[2] Act of June 15, 1880, 21 Stat. 199.

[3] Act of March 1, 1899, 30 Stat. 924, 940-941; Act of March 3, 1903, 32 Stat. 982, 997; Act of April 30, 1908, 35 Stat. 70, 95; Act of March 11, 1948, 62 Stat. 72.

Early legislation authorizing negotiations for the Uintah Reservation was not carried out,[4] or failed because the negotiations were unsuccessful. In 1902 legislation, Congress set a definite date by which the allotments were to be made and "on which date all the unallotted lands within said reservation shall be restored to the public domain." Act of May 27, 1902, 32 Stat. 245, 263. However, the Act was conditioned on the consent of the Indians, and such consent could not be obtained. In 1903, this Court handed down its decision in *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903), confirming that Congress had plenary power and full legislative authority over tribal relations and property, and holding that the consent of Indians to the disposition of their reservation was not necessary. Following this decision, Congress specified another date on which the reservation was to be opened. Act of March 3, 1903, 32 Stat. 982,997. After additional postponement to allow time for the making of allotments, the reservation was declared " 'restored to the public domain' " and opened "under the homestead laws" in 1905. Presidential Proclamation of July 14, 1905, 34 Stat. 3119. Beginning in 1906, subsequent legislation consistently referred to the area as the "former Uintah Reservation."[5] In 1957, the Court of Claims used the same terminology in a case in which the Indians sued for

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[4] Act of August 15, 1894, 28 Stat. 286, 337; Act of June 4, 1898, 30 Stat. 429. Congress inquired into the failure of the executive branch to act under this legislation. 30 Con.Rec. 614, 55th Cong., 1st Sess., April 6, 1897; S.Doc. 32, 55th Cong., 1st Sess., April 13, 1897.

[5] Act of June 21, 1906, 34 Stat. 325, 375; Act of April 30, 1908, 35 Stat. 70, 95; Act of April 4, 1910, 36 Stat. 269, 285; Act of March 3, 1911, 36 Stat. 1058, 1074; Act of July 20, 1912, 37 Stat. 196; Act of May 14, 1920, 41 Stat. 599.

compensation for a portion of the Uintah Reservation that had been incorporated into the Uintah National Forest at the time of the disestablishment. *Uintah and White River Bands of Ute Indians* v. *United States,* 139 Ct.Cls. 1, 2-3 (1957).[6]

A grazing reserve was set aside out of the Uintah Reservation to be held in common by the Indians. Joint Resolution 31, June 19, 1902, 32 Stat. 744. The Uintah Agency was combined with the Ouray Agency at the former Uncompahgre Reservation (named for Chief Ouray of the Uncompahgres) to form the Uintah and Ouray agency, and this agency continued Government services to the Indian population of the area, as in *DeCoteau, supra.* Over the next 40 years, the commonly held grazing tract and the trust allotments in the area were sometimes referred to as the "Uintah and Ouray Reservation," the name coming from the name of the agency, although no act of Congress had used this term.

In the Act of March 11, 1948, 62 Stat. 72, Congress set aside a tract of approximately 500,000 acres as an "extension" of the Uintah and Ouray Reservation. This Act delineated a contiguous boundary line, without any reference to the two original reservations. This indicates that the reservation being "extended" was not the two original reservations, but only the

[6] The Interior Department considered the area to be subject to state jurisdiction after the opening proclamation. In 1926, the Indian Field Service at Albuquerque informed the Commissioner of Indian Affairs in Washington of the status of non-trust land in the area:

> The Uintah reservation was opened for settlement some years ago, and the State laws govern in such territory.

Significantly, Appellant cites no cases or rulings in support of his position on Indian country status.

remaining tracts still held in trust for the Tribe or for individual Indians. As stated above, the State recognizes the Indian country status of these trust tracts and the entire area within the contiguous boundary line set by the 1948 Act.

The purpose of the 1948 Act was stated as follows:

> The Department of the Interior has long been convinced of the necessity for establishing this reservation as a permanent reserve for the Indians exclusively . . .

H.R. Rep. 1372, 80th Cong., 2d Sess., February 12, 1948, p. 2. It was felt that a fairly large, contiguous reservation area would be beneficial. Had the original Uncompahgre and Uintah Reservations not been disestablished, there would have already been a reservation of about three million acres. This Act, therefore, confirms what the effect of the earlier Congressional action had been.

Even more precise confirmation comes from the fact that over 50% of the land in the 1948 extension was described as land that had been in the "former Uncompahgre Reservation."[7] Obviously, if the Uncompahgre Reservation was not disestablished by the surplus land act which opened it, there would have been no need to put land from that reservation into an Indian reservation in 1948.

It is the Tribe's position in the pending federal cases cited above that it has jurisdiction over the entire area within the original boundaries of the Uintah Reservation and the original boundaries of the Uncompahgre

[7] H.R.Rep. 1372, 80th Cong., 2nd Sess., February 12, 1948, p. 6. The 1948 Act on its face expressly referred to the "former Uncompahgre Reservation." Jurisdictional Statement, p. A21.

Reservation, as well as the area within the line established by the 1948 Act (which overlaps with much of the Uncompahgre boundary). The Tribe denotes all three of these areas as the present Uintah and Ouray Reservation. The incident herein occurred off of trust land and within the original Uintah Reservation boundary. Technically, only the statutes affecting the Uintah Reservation disestablishment are relevant here.

The Uintah disestablishment was the culmination of a series of Acts of Congress. Unlike the situation in *Mattz* v. *Arnett, supra,* however, there was no congressional opposition which required changes in the legislation. Here the need for additional legislation was due at first to the fact that congressional directives aimed at disestablishing the reservation were simply not carried out, and later to the fact that considerable time was needed to actually make the allotments.

Significantly, however, the principle Act, under the authority of which the opening Proclamation was issued, stated on its face that "all the unallotted lands within said reservation shall be restored to the public domain." Act of May 27, 1902, 32 Stat. 263, Jurisdictional Statement, p. A29. This Court has stated that the phrase "vacated and restored to the public domain" is "clear language" of express disestablishment. *Mattz, supra,* 412 U.S., at 504 n. 22. In *DeCoteau, supra,* the public domain language did not appear on the face of the Act, but this Court deemed it significant that the sponsors of the legislation stated repeatedly that the lands would be returned to the public domain. 420 U.S., at 446. This provision is completely inconsistent with continued reservation status, and is persuasive evidence that disestablishment of the reservation boundary was intended.

B. The Surrounding Circumstances and Legislative History Confirm the Congressional Intent to Disestablish.

In addition to the "clear language" of express disestablishment on the face of the 1902 Act, the relevant legislative history and surrounding circumstances amply support the result reached by the court below, under the analysis which this Court has applied in *DeCoteau, Mattz* and *Seymour.* In *Ute Indian Tribe* v. *State Tax Commission,* the State, in a brief of extended length filed in the Tenth Circuit, has set forth the legislative history in the manner in which it was discussed in *DeCoteau.* A short sampling of references to that legislative history confirms that the congressional intent of the Uintah legislation was as held by the court below.

As in *DeCoteau,* the judicial task here is the "narrow" task of determining the intent of Congress at the time of the legislation in question. 420 U.S., at 449. At that time, the policy of § 5 of the General Allotment Act of February 8, 1887, 27 Stat. 388, was considered the ideal reconciliation of two governmental objectives. These were promoting Indian welfare by breaking up tribally held reservations into individually owned allotments, and making more land available for homesteading by restoring surplus lands to the public domain. As early as 1894, Congress began to apply this policy to the Uintah Reservation:

> If the consent of the Indians upon the Uintah Reservation can be obtained, by which they will accept allotment of lands in severalty, and the remainder of the lands is sold and the proceeds derived are used for the benefit of the Indians, their condition will be much better than it is at present.

H.R. Rep. 660, 53rd Cong., 2nd Sess., April 4, 1894.

Hearings concerning the Uintah Reservation, held while Congress was considering the 1902 "public domain" Act, contain the following comment on the Uintah legislation by the Commissioner of Indian Affairs:

> Commissioner JONES. I can not go into the details of it, Mr. Chairman, but generally speaking I am in favor of a bill of this character. I do not believe in reserving large tracts of land for the exclusive use of Indians.

S. Doc. 212, 57th Cong., 1st Sess., February 22, 1902, p. 4.

In the 1903 Indian Appropriation Act of March 3, 1903, 32 Stat. 982, Congress supplemented the 1902 Act with the provision that the Uintah Reservation would be restored to the public domain even if the Indians did not concur. In the debate on this Act, the universal acceptance of the disestablishment policy was stated by the Chairman of the House Committee on Indian Affairs as follows:

> The gentleman from Ohio suggests as a second step forward to do away with the reservation. He is in accord with the chairman in that regard, with the Indian Rights Association, with the board of Indian commissioners, with the Mohonk conference, with the Indian Office, with the Committee on Indian Affairs.

36 Cong. Rec. 1281, 57th Cong., 2nd Sess., January 26, 1903. In the debate on the 1903 Act, Rep. Sutherland of Utah, later an Associate Justice of this Court, made a specific reference to the effect of this legislation on the actual boundary of the reservation. The Congressman made the following objection to an appropriation

to resurvey the southern and western boundary lines of the Uintah Reservation to settle a standing dispute in the area:

> If the Uintah Reservation is opened, which I believe it will be, this appropriation of $6,000 for reestablishing the boundary lines of the reservation is entirely useless. The boundary lines have been in their present condition for many years, and if by any mischance the reservation should not be opened it will not hurt to let it wait for another year; and if the reservation is opened it is simply an appropriation of $6,000 without any useful purpose whatever.

36 Cong. Rec. 1388, 57th Cong., 2nd Sess., January 28, 1903. The statement that the bounday line would be meaningless after the Act went into effect was not questioned by other Congressmen who joined in the discussion. Clearly the Uintah legislation was intended to disestablish the reservation.

The final attempt at negotiating the Indians' consent took place shortly after the 1903 Act was passed. As in *DeCoteau,* the transcript of the negotiations reveals that the Indians perceived the legislation as effecting a disestablishment of their reservation and as abolishing the original reservation boundary. The transcript contains numerous statements by members of the Tribe such as the following:

> We are not going to give up any of this reservation away, nor have it cut in little pieces. It is ours, and we are going to keep it. We know our reservation line, and the White Man knows it.
>
> We do not want this reservation line changed in any way.
>
> Our land here is just as if fenced around with iron and we do not want to break it now.

> There has been a line run around this reservation and I do not want it broken . . .
>
> The line is laid around this land and there is no one who can come in upon it.

Council Transcript, pp. 14, 17, 18, 30, 39. The Government negotiator, Inspector James McLaughlin, confirmed their perception of the legislation:

> You say that line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and after next year *there will be no outside boundary line to this reservation.*

Council Transcript, p. 42 (emphasis added). Thus the surrounding circumstances and legislative history, as well as the subsequent legislation, confirm the intent of Congress to disestablish the reservation boundary which intent is contained in the 1902 Act itself and the 1905 Proclamation.

C. The Reservation Boundaries Were Disestablished on the Date the Reservation Was Proclaimed Opened by Presidential Proclamation.

The method used to compensate the Indians for the surplus lands was to place the proceeds of sales to homesteaders in trust for the benefit of the Indians. This is different from the payment of a specified sum in trust by the United States immediately, which was done in *DeCoteau.* This method of payment, however, does not constitute a bar to reservation disestablishment as an absolute rule, or this Court would have so held in *Mattz* and *Seymour, supra.* Instead, the Court in those cases found that the acts on their faces were not clearly

determinative of congressional intent and looked to the legislative history.

The legislative history in the present case shows that the change in method of payment clearly did not signify any change in congressional intent. In the Uintah legislation patterned after § 5 of the General Allotment Act, the House, by amendment, changed the method of payment to be used. 31 Cong. Rec. 5156, May 24, 1898. When the Senate considered the amendment, it was explained as follows:

> Mr. RAWLINS. I move that the Senate concur in the amendments of the House of Representatives to the bill. The amendments made by the House of Representatives do not materially change the bill.

31 Cong. Rec. 5183, May 25, 1898.

The Eighth Circuit has held that the change in method of payment which occurred at this time was not related to any change in congressional intent regarding disestablishment of boundaries, when presented with an even more extensive legislative history on the subject in *Rosebud Sioux Tribe* v. *Kneip,* 521 F.2d 87 (8th Cir. 1975), cert. granted, 425 U.S. 989.

The delayed or uncertain-sum method of payment may make a difference in cases where the issue is what interest the Indians may have retained after the opening, or where the issue is on what date all Indian interest ceased. But it is not relevant to the question of whether or when the reservation was disestablished.

The landmark case which states that the Indians retained a "lingering beneficial interest" because of the delayed payment provision is *Ash Sheep Co.* v. *United*

States, 252 U.S. 159 (1920). But even in that case it is clear that the portion of the reservation involved was disestablished and new, smaller reservation boundaries replaced the original boundaries.[8]

The separateness of the property question and the reservation status question is illustrated by a comparison of two cases. In *United States* v. *Creek Nation,* 295 U.S. 103 (1935), the question was the exact time at which title was transferred in a taking which resulted from a surveyor's error. A portion of Creek land was mistakenly included as part of a tract ceded by another tribe, allotted and opened for settlement. The Court held that the taking occurred not at the time of the survey, but at the time patents were issued for the lands. Thus the Indians retained an interest in the land, which in that instance they owned in fee, until the United States conveyed title to someone else. By contrast, in *United States* v. *Southern Pacific Transportation Co.,* 543 F.2d 676 (9th Cir. 1976), the question was when disestablishment had occurred, since a right-of-way arose when lands were no longer "within the limits of" any reservation. In that case, the Ninth Circuit held that the surplus land act had disestablished the reservation boundary, and that disestablishment occurred on the date of the Presidential Proclamation issued pursuant to the act. *Southern Pacific, supra,* 543 F.2d., at 696. Regardless of any property

[8] The Act involved in *Ash Sheep* mentioned new boundary lines in five separate places on its face. Act of April 27, 1904, 33 Stat. 352, 359, 360. For instance, § 4 provided that "new boundary lines" would be surveyed according to the Act and "permanently marked in a plain and substantial manner by prominent and durable monuments." Of course, the disestablishment here, as in *DeCoteau,* was of the entire reservation, so there was no new boundary line to be marked.

interest the Indians may have retained in the surplus lands until patents were issued to homesteaders, the reservation boundary line was dissolved and reservation status of unallotted and unreserved lands ceased on the date the land was proclaimed restored to the public domain by the Proclamation.[9]

Thus in *DeCoteau* allotments were made even after the passage of the Act, up until the reservation was actually proclaimed opened. But after the date of the Proclamation, special legislation would have been needed because the area was no longer within a reservation. Just such special legislation was, in fact, passed regarding the Uncompahgre Reservation because some Indians had been left without allotments on the date set for the opening. *See* Act of March 1, 1899, 30 Stat. 924, 940.

The Interior Department has also recognized that reservation boundaries may be disestablished by a sur-

[9] The question of when disestablishment took place was also at issue in *United States* v. *LaPlant,* 200 F. 92 (D.S.D. 911). In that case the question was whether state jurisdiction applied because the area was no longer "within the limits" of a reservation, or whether the fact that the land had not been homesteaded precluded state jurisdiction. The court held that disestablishment of the reservation had occurred at the time of the passage of the surplus land act or the proclamation pursuant thereto, rather than at the time of entry or payment by a homesteader. The complexity of the issue, however, is illustrated by the fact that the court used the word "title" to refer to the change that took place on that date of the proclamation rather than speaking of disestablishment or the dissolution of boundaries.

This Court in *United States* v. *Pelican,* 232 U.S. 442 (1913), clarified that the *LaPlant* holding for non-trust lands did not apply to trust allotments in an opened and disestablished area. The latter were still Indian country. This was codified in 18 U.S.C. 1151(c). *See DeCoteau, supra,* 420 U.S., at 446-447, citing *Pelican* with approval.

plus land act, on the date specified in the proclamation, even though the uncertain-sum method of payment was used. In a 1938 Opinion, the Department noted that numerous surplus land acts had used the uncertain-sum method and had also contained express language restoring the land to the public domain. These included the 1880 Ute Act in Colorado, which resulted in the relocation of the Uncompahgre band to Utah, and the 1889 Great Sioux Act, involving the western half of South Dakota. The Department held that undisposed of surplus lands could be restored to tribal ownership under the 1934 Indian Reorganization Act even though they were no longer within reservation boundaries, the reservations having been disestablished at the time of the legislation and proclamations. 56 I.D. 330 (1938).

D. The Plenary Power of Congress, as Recognized by This Court, Authorized the Disestablishing Legislation.

It is a fundamental principle of Indian law that Congress has full legislative power in the area of Indian affairs. *Cherokee Nation* v. *Hitchcock,* 187 U.S. 294 (1902); *Roff* v. *Burney,* 168 U.S. 218 (1897); *Stephens* v. *Cherokee Nation,* 174 U.S. 445 (1899); *Blackfeather* v. *United States,* 190 U.S. 368 (1903); *Choate* v. *Trapp,* 224 U.S. 665 (1912). "The plenary character of this legislative power over various phases of Indian affairs has been recognized on many occasions." *Board of Commissioners* v. *Seber,* 318 U.S. 705, 716 (1946).

This principle was applied to the question of whether consent was required for a surplus land act in *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903). Congressional debates even before *Lone Wolf* addressed this power in the surplus land context. S.Doc. 212, 57th Cong., 1st

Sess., February 22, 1902, p. 10. As noted above, the *Lone Wolf* decision settled the question before the Uintah legislation went into effect.

Treaties establishing reservations often provided that consent to a future cession of the land therein could be accomplished with the consent of a specified portion, such as three-fourths, of the adult males of the tribe. There was no such treaty with respect to the Uintah Reservation. Therefore, Congress determined that it would attempt to obtain the consent of a majority of the members. After the *Lone Wolf* decision, Congress again provided for negotiations to explain the Act and obtain majority consent if possible, although it set a date on which the reservation was to open regardless of the outcome of these negotiations. Act of March 3, 1903, 32 Stat. 982. Thus, while Congress fully exercised its plenary power, it consistently attempted to be as fair as possible to those affected, as contemplated by the *Lone Wolf* decision.

II. THE QUESTIONS WHICH APPELLANT CLAIMS ARE RAISED IN THIS APPEAL ARE NOT, IN FACT PRESENTED.

The holding of the court below was a simple one: An Act of Congress and a Presidential Proclamation pursuant to that Act "placed the land of the Indian Reservation not theretofore allotted to Indians back on the public domain." Jurisdictional Statement, p. A 3. Therefore the state courts had subject matter jurisdiction over the incident and personal jurisdiction over the Defendant because the area in question was no longer within an Indian Reservation. The fact that the court did not extensively cite from the legislative history of the disestablishing legislation discussed above is attributable to the manner in which the case has proceeded

and been presented to the court, and to the fact that the "public domain" language was contained on the face of the Act of March 27, 1902, 32 Stat. 263, which the court cited.

This holding made it totally unnecessary for the court below to go on to considerations of whether there was state jurisdiction because of 25 U.S.C. 1321-1326, the so-called "Public Law 280" jurisdiction. Public Law 280 dealt solely and expressly with the assumption of jurisdiction in "Indian Country." 25 U.S.C. 1321, 1322, 1326. The court below held that the area in question was not Indian country, because it was not, contrary to Appellant's position, within an Indian reservation. See 18 U.S.C. 1151. As in *DeCoteau,* any consideration of Public Law 280 would be begging the question.[10] The issue on which both courts below decided this case was the issue of whether the area in question is Indian country. Appellee cited the 1902 Act to both courts, and their disposition of the threshhold Indian country question precluded any possibility of Public Law 280 becoming relevant to the case. No question of jurisdiction pursuant to Public Law 280 was reached or decided. In order to give the impression that numerous substantial questions are involved in this case, however, Appellant has devised three "Questions Presented" which assert Public Law 280 issues. Indeed, two of these claim to be constitutional questions concerning the application of Public Law 280. Jurisdictional Statement, pp. 3, 4.

Appellee did not claim, nor does the State claim, and the court did not hold, that state jurisdiction existed by

[10] The fundamental error of the dissent below was that it considered the area to be Indian country, based solely on an affidavit of the superintendent of the local reservation agency, and went on to consider Public Law 280.

virtue of Public Law 280. Instead, Appellee and the State submit, and the court held, that state jurisdiction existed over the area in question just as it exists elsewhere in Utah, because the area in question is not Indian country.

The State of Utah has not at any time attempted to assert jurisdiction over the area in question and Indians therein on the basis of Public Law 280, 25 U.S.C. 1321-1326, or Utah Code Ann. 63-36-9 through 18. Any alleged issue involving the application of these statutes is pure fabrication. No controversy exists between the parties herein or between the State of Utah and the Ute Indian Tribe concerning these statutes.

Three of the four Questions Presented listed in the Jurisdictional Statement are based upon the claimed application of Public Law 280. The remaining question listed is based on the premise that "the Utah Supreme Court has declared that the Congressionally recognized Ute Indian Tribe no longer exists and that the members of the Tribe no longer have an interest in their reservation lands or immunities resulting therefrom." Jurisdictional Statement, p. 4. Appellant repeatedly claims that the court below ruled that "neither the Ute Tribe nor the Uintah and Ouray Reservation now exists." Jurisdictional Statement, p. 19. In support of these claims, Appellant only cites the following statement from the opinion:

> The Ute nation, of the long-ago treaty, no longer exists, and the descendants of the inhabitants of that nation are now citizens of the United States.

Jurisdictional Statement, p. A4. Appellant focuses on this discussion of treaty rights, and ignores the portion of the opinion in which the court states the issue:

> The sole question presented on this appeal is whether or not the district courts of the State of

> Utah have jurisdiction over *enrolled members of the Ute Indian tribe* within the area. . . .

Jurisdictional Statement, p. A2 (emphasis added). Contrary to the claim made by Appellant, the Utah Supreme Court clearly and explicitly recognized the continuing existence of the Ute Indian Tribe. The court recognized the status of Appellant as an enrolled member of the Tribe.

Appellant also claims that the court below held that the Uintah and Ouray Reservation no longer exists, also based on the above statement. Jurisdictional Statement, p. 10. In fact, the court only held that the area involved, which was within the original Uintah Reservation, was no longer Indian country because the Uintah Reservation was disestablished. The court made no comment, even in dicta, about the present Uintah and Ouray Reservation, which is located near the former Uintah Reservation and largely within the former Uncompahgre Reservation.

It is not the position of the State of Utah that this decision or anything else holds that the Uintah and Ouray Reservation no longer exists. But it is the State's position that the present Uintah and Ouray Reservation does not coincide with the original boundaries of the former Uintah Reservation.

Any other statements the court below may have made about Indian property rights or treaty rights, or constitutional considerations that may result from the exercise of state or tribal jurisdiction, are not part of the holding of the case. No fact situations involving these questions are present, and no controversy exists as to them, either between the parties or between the State and the Ute Indian Tribe.

III. THE DECISION BELOW IS NOT PROPERLY SUBJECT TO APPEAL TO THIS COURT.

The erroneous statements of Questions Presented lead Appellant to claim a right of appeal to this Court under 28 U.S.C. 1257 (1). Appellant argues that the decision below was against the validity of 25 U.S.C. 1322(a) and 1326. As explained above, however, the decision below did not and could not have dealt with those statutes. Appellant also argues that the decision invalidates various acts of Congress which recognize the existence of the Ute Indian Tribe and the Uintah and Ouray Reservation. As shown above, however, the court below specifically recognized the existence of the Tribe and did not address the Uintah and Ouray Reservation. Thus the asserted basis for appeal, the invalidation of federal statutes, is not present. Any question of statutory invalidity in this case is "too tangentially involved" to satisfy the requirement of 28 U.S.C. 1257. *Garrity* v. *State of New Jersey*, 385 U.S. 493 (1967).

An appeal improvidently taken may be regarded as a writ of certiorari. 28 U.S.C. 2103. When this is done, the Court can only consider the federal questions actually passed upon by the state court. *Wilson* v. *Cook*, 327 U.S. 474 (1946). As noted, the court did not pass upon the questions raised by Appellant.

The considerations which warrant the grant of plenary certiorari jurisdiction are not present here. There is at present no clear conflict between the state court and the Court of Appeals since the latter has not yet handed down its ruling on the disestablishment question. There are no significant constitutional or statutory questions other than the intent of the disestablishing statutes themselves. This Court has set

down adequate standards for the determination of Congressional intent in such cases. *DeCoteau, supra; Mattz, supra.* *DeCoteau* was the foundation of the opinion below. However, should this Court decide to exercise its power to hear this case, the State does appreciate the fact that an authoritative resolution to the conflict between the rulings of the United States District Court and what had been the status quo, as reflected by the decision herein, would be more speedily obtained. This would help alleviate the animosity caused by the Tribe's assertion of expanded personal, territorial and subject matter jurisdiction.

CONCLUSION

The decision sought to be appealed correctly held that the Uintah Reservation was disestablished in 1905, and that the non-trust lands within the original boundaries of that reservation are now no longer within a reservation and, therefore, are not Indian country. The Uintah legislation, and the surrounding circumstances and legislative history of that legislation, reveal that this was the intent of Congress.

The State of Utah, as *amicus curiae,* respectfully requests that this Court dismiss this appeal.

Respectfully submitted,

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No. 76-815

In the Supreme Court of the United States

OCTOBER TERM, 1976

RAMON R. APPAWORA, APPELLANT

v.

MYRON BROUGH

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-815

RAMON R. APPAWORA, APPELLANT

v.

MYRON BROUGH

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of February 22, 1977, inviting the Solicitor General to express the views of the United States. It is the position of the United States that this Court should treat the papers as a petition for a writ of certiorari, grant the petition, vacate the judgment of the Utah Supreme Court, and remand the case for reconsideration in light of the decision in *Rosebud Sioux Tribe* v. *Kneip*, No. 75-562, decided April 4, 1977.[1]

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[1]The Supreme Court of Utah did not expressly rule that any federal statute interdicting state court jurisdiction was violative of the Constitution (Pet. App. A5). Under those circumstances, we question whether the appellate jurisdiction of this Court is appropriately invoked.

Ramon Appawora, an enrolled member of the Ute Indian Tribe and a resident of the Uintah and Ouray Reservation, was sued in a Utah county district court by Myron Brough, a non-Indian, for injuries arising out of an automobile accident. The accident occurred on a public county road south of Fort Duchesne, Utah, which, in the Tribe's view, lies within the exterior boundaries of the Uintah and Ouray Reservation (Pet. App. A2). Appawora failed to enter an appearance and judgment was entered against him. Alleging that the state court lacked jurisdiction over him and the subject matter, Appawora filed a motion to set aside the default judgment, which the county district court denied (Pet. App. A12).[2]

The Utah Supreme Court, by a divided vote, upheld the civil jurisdiction of the county court. After considering the Presidential Proclamation of July 14, 1905, 34 Stat. 3119, which restored unallotted land within the Uintah Reservation "to the public domain," and this Court's decision in *DeCoteau* v. *District County Court*, 420 U.S. 425,[3] the Utah Supreme Court apparently concluded, without explicitly stating, that the original boundaries of the Reservation had been diminished. The court also stated (Pet. App. A4) that "[t]he Ute nation, of the long-ago treaty, no longer exists, and the descendants of the inhabitants of that nation are now citizens of the United States." The court

[2]The order of the Uintah County District Court stated that the case "came on for hearing on the motion of the Ute Indian Tribe" to set aside the default judgment (Pet. App. A12). The Ute Tribe has never been a party to this action.

[3]The court also referred (Pet. App. A3) to a judgment obtained by the Ute Indians for the sale of lands previously held in Colorado (*Confederated Bands of Ute Indians* v. *United States*, 120 Ct. Cl. 609). See p. 7, *infra*.

then went on to suggest that due process requires that an enrolled Indian be "tried under the law of the land for a tort or crime committed by that Indian" (Pet. App. A5).

The holding of the Utah Supreme Court is not easily extracted from its opinion.[4] We believe, however, that the opinion, fairly read, holds that the boundaries of the Uintah and Ouray Reservation have been contracted and that the State of Utah may assert civil jurisdiction over Indians with regard to incidents occurring within that territory. We further believe that the decision is incompatible with the principles established by this Court in *Seymour* v. *Superintendent*, 368 U.S. 351; *Mattz* v. *Arnett*, 412 U.S. 481; *DeCoteau* v. *District County Court, supra*, and *Rosebud Sioux Tribe* v. *Kneip*, No. 75-562, decided April 4, 1977.

1. The principles to be applied in reservation boundary cases are well-established. In *DeCoteau* v. *District County Court, supra*, 420 U.S. at 444, this Court stated:

> This Court does not lightly conclude that an Indian reservation has been terminated. "[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." * * * The congressional intent must be clear, to overcome "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' " * * * Accordingly, the Court requires that the "congressional determination to terminate * * * be expressed on the face of the Act

[4]Indeed, respondent and the State of Utah, as *amicus curiae*, are in disagreement over the meaning of the opinion below. Compare Respondent's Motion to Dismiss at 3-6, with Brief of the State of Utah at 6-19.

> or be clear from the surrounding circumstances and legislative history." * * * In particular, we have stressed that reservation status may survive the mere opening of a reservation to settlement, even when the moneys paid for the land by the settlers are placed in trust by the Government for the Indians' benefit.

In *Rosebud Sioux Tribe* v. *Kneip*, No. 75-562, decided April 4, 1977, this Court reemphasized that Indian reservations are not to be regarded as disestablished in the absence of clear congressional intent.[5]

The history of the Uintah and Ouray Reservation, read in the light of these principles, reveals no clear intention of Congress to contract the boundaries of the Reservation. By the Act of May 5, 1864, 13 Stat. 63, Congress confirmed the establishment of an Indian reservation in the "Uinta valley" of Utah as previously authorized by President Lincoln, Executive Order of October 3, 1861, 1 Kappler, *Indian Affairs*, 900 (1904). The exact demarcations of the "Uinta valley," and thus the boundaries of the Reservation, were permanently established by a survey by C. L. DuBois. See Executive Order of January 5, 1882.

The General Allotment Act of 1887, 24 Stat. 388, provided that the President could allot tracts within a reservation to individual Indians for agricultural and grazing purposes, and open the surplus reservation lands to non-Indian settlement. See *Mattz, supra*, 412 U.S. at 496. Consistent with this policy, Congress enacted several

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[5]In *Rosebud Sioux Tribe* this Court found in the surrounding circumstances and legislative history compelling evidence that three Acts of Congress had disestablished the Rosebud Reservation *pro tanto*. As we discuss in the text, the materials relied on by the Utah Supreme Court bear no relation to the materials deemed persuasive in *Rosebud Sioux Tribe*.

statutes providing for allotments on the Uintah Reservation to the Uintah and White River Utes. Act of June 10, 1896, 29 Stat. 321, 341-342; Act of June 4, 1898, 30 Stat. 429.[6] Each of these Acts required approval of either three-fourths or a majority of the adult male Indians residing on the Reservation. There was strong opposition to opening the Reservation to non-Indians and the necessary consent was never obtained. *Annual Report of the Commissioner for 1899*, p. 351.[7]

In 1902, Congress attached to the Uintah Reservation allotment statute a provision opening the Reservation to public entry, thus accommodating the westward settlement

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[6]From the trial of its establishment, the Uintah Reservation was inhabited by several different bands of Ute Indians, including the Uintahs. In 1880, the White River Utes of Colorado agreed to move to the Uintah Reservation. Act of June 15, 1880, 21 Stat. 199; *Uintah and White River Bands of Ute Indians* v. *United States*, 152 F. Supp. 953, 955 (Ct. Cl.). The Uncompahgre Utes, also of Colorado, were removed to Utah to a reservation set apart for them, but contiguous to the Uintah Reservation. Executive Order of January 5, 1882, 1 Kappler, *Indian Affairs* 901 (1904). Pursuant to the Act of June 7, 1897, 30 Stat. 62, 87, a small number of Uncompahgre Utes chose to receive allotments on the Uncompahgre Reservation while the rest of the band relocated on the Uintah Reservation. Act of March 1, 1899, 30 Stat. 924, 940. Statutes relating to the allotment of the Uintah Reservation individually referred to the Uintah, White River and Uncompahgre Utes because the Uncompahgre band was required to compensate the other bands for allotment land selected by the Uncompahgres on the Uintah Reservation. Pursuant to the Indian Reorganization Act of 1934, 48 Stat. 897, 25 U.S.C. 476, the Uintah, Uncompahgre and White River bands became established as the Ute Indian Tribe with a constitution approved by the Secretary of the Interior in 1937.

[7]The Uintah Reservation residents were aware of the effects of opening the Reservation. They had already consented to a sale to the United States, for a lump sum payment, of a small portion of land on the eastern edge of the Reservation to be restored to the public domain. Act of May 24, 1888, 25 Stat. 157. It is not contended here that this area remained a part of the Reservation.

expansion. The Act of May 27, 1902, 32 Stat. 245, 263, provided that with majority consent of the adult male Indians, allotments would be made and "all the unallotted lands within said reservation shall be restored to the public domain * * * ." Because the Utes continued to withhold consent, Congress extended the date for opening the Reservation and finally deleted the need to obtain consent prior to allotment. Act of March 3, 1903, 32 Stat. 982, 997.[8]

The Presidential Proclamation of July 14, 1905, 34 Stat. 3119, citing the 1902 Act unapproved by the Utes, then "restored to the public domain" the unallotted lands of the Uintah Reservation[9] under the method of entry and settlement set forth in the homestead laws.

Contrary to the statement of the Utah Supreme Court (Pet. App. A3-A4), the Ute Indians did not receive a lump sum payment for their unallotted tribal lands. Rather, as the land was sold, the proceeds were placed in trust by the United States to be used for the benefit of the Uintah Reservation Indians (32 Stat. 245, 263).[10] Although a

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[8]The formal date for opening the Uintah Reservation to settlement was postponed twice more. Act of April 21, 1904, 33 Stat. 189, 207; Act of March 3, 1905, 33 Stat. 1048, 1069.

[9]The name "Uintah and Ouray Reservation" for the combined area of the Uintah and Uncompahgre Reservations was not formally adopted until the Constitution of the Ute Indian Tribe, approved in 1937 ("the Ute Indian Tribe of the Uintah and Ouray Reservation * * *"). Ouray, Utah was the agency office for the Uncompahgre Reservation and the two adjoining reservations were inconsistently referred to as one for some time. Compare *Report of the Department of Interior for 1912*, Vol. II, p. 115 (Utah Reservations: Uintah Valley, Uncompahgre) with *Annual Report of the Secretary of Interior for 1934*, p. 149 (Utah Reservation: Uintah and Ouray Agency and Reservation).

[10]Under this "installment" method of payment, beneficial title to the unsold lands remained in the Indians. *Ash Sheep Co.* v. *United States*, 252 U.S. 159.

certain sum was appropriated and paid to the Uintah and White River Utes under the 1902 Act, that sum was not payment for the unallotted, opened lands but rather payment in part for those allotments selected by the Uncompahgre Indians on the Uintah Reservation and in part for that tract of land returned to the public domain under the Act of May 24, 1888, 24 Stat. 157. Furthermore, the judgment received by the Uintah and White River Utes in 1943 did not concern land on the Utah Reservation but property in Colorado belonging to the Confederated Bands of Utes and ceded to the United States in 1880 when the Ute band relocated in Utah. *Confederated Bands of Ute Indians* v. *United States*, 100 Ct. Cl. 413; 112 Ct. Cl. 123; 120 Ct. Cl. 609.

Under these circumstances, and in the absence of any assured payment for the opened lands,[11] the boundaries of a reservation should not be held to be disestablished without compelling legislative history showing that federal and tribal jurisdiction were to be displaced. The Utah Supreme Court cited no such history, and the briefs in this Court, while more extensive, are similarly unpersuasive. While Congress obviously desired to open the Reservation for settlement, there is no indication that such opening was viewed as inconsistent with continued federal jurisdiction over the original reservation.[12] Although the Utah Supreme

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[11]Although "not conclusive with respect to congressional intent" (*Rosebud Sioux Tribe* v. *Kneip*, *supra*, slip op. 4), the failure to provide for a guaranteed payment to the Tribe argues strongly against an intent to oust the Tribe and federal government from jurisdiction over the opened areas. Under such circumstances, if the lands were not sold to white settlers or if the settlers defaulted on their payments, the Indian Tribes would have been dispossessed of jurisdiction over the lands without any payment at all. This result should not be reached in the absence of compelling legislative history.

[12]See, for example, the House discussion regarding the need to define the reservation boundary lines, whether or not the reservation was opened for entry. 36 Cong. Rec. 1388 (1903).

Court seemed to give conclusive weight to the "public domain" language, this terminology was omitted in the later statutes, extending the date for opening the Uintah Reservation, which spoke of "opening the unallotted lands to public entry." Act of March 3, 1903, 32 Stat. 982, 998; Act of April 21, 1904, 33 Stat. 189, 207; Act of March 3, 1905, 33 Stat. 1048, 1069. Moreover, if the term "public domain" were meant to convert surplus lands to public lands, it would have been unnecessary to specify the method of entry and settlement in the July 14, 1905 Proclamation, because the general laws relating to public entry would automatically have applied.

After passage of the 1902 Act, Congress continued to treat the Uintah and Ouray Reservation as an undiminished reservation. Although there were references to the "former reservation" in statutes enacted immediately after the opening, that term was hardly used with consistency. See, *e.g.*, Act of June 20, 1906, 34 Stat. 325, 375. In any event, this Court has recognized such references as no more than a "natural, convenient, and shorthand way of identifying the land subject to allotment* * *." *Mattz, supra,* 412 U.S. at 498.

In 1934, Congress passed the Indian Reorganization Act which provided, in part, that undisposed of tribal lands, opened to public entry but not ceded for a sum certain, were to be restored to full tribal ownership. Act of June 18, 1934, 48 Stat. 984, Section 3. Had Congress viewed the opening of unallotted lands as the equivalent of terminating the reservation, language "returning" the surplus lands to tribal ownership would clearly have been inappropriate. Yet, the Secretary of the Interior specifically determined that the surplus lands on the Uintah and Ouray Reservation had not

been converted to the public domain, and, impliedly, that the Reservation had never been diminished. 54 I.D. 559, 562.[13]

In 1948, Congress demonstrated its recognition of the undiminished status of the Uintah and Ouray Reservation by *extending* the boundaries of the Reservation to include more than 500,000 acres, in an attempt to settle grazing disputes between Indians and non-Indians. Act of March 11, 1948, 62 Stat. 72.

Neither the 1902 Act, the 1905 Proclamation, the legislative history, nor Congressional treatment of the Uintah and Ouray Reservation express the requisite clear intent necessary to terminate the Uintah and Ouray Reservation. Even if the meaning of the 1902 Act were uncertain, which it is not, doubtful expressions in Indian legislation are to be resolved in favor of the Indians. *Choate* v. *Trapp,* 224 U.S. 665, 675; *Antoine* v. *Washington,* 420 U.S. 194, 200. The Uintah and Ouray Reservation therefore has not been disestablished.

2. Because the Supreme Court of Utah apparently believed that the Uintah and Ouray Reservation had been disestablished, its opinion contains no focused discussion

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[13]Citing this same Interior decision, in *Seymour, supra,* 368 U.S. at 357, n. 14, this Court relied on a similar construction given by the Secretary to the Colville Reservation "opening" statute. The Secretary has consistently treated the Uintah and Ouray Reservation as undiminished. See, *e.g.*, 33 I.D. 610 (opened lands were not subject to Utah's school grant privileges which applied only to public domain land); Reports of Commissioner of Bureau of Indian Affairs including unallotted lands within Uintah Reservation boundaries (1929); Order of Restoration of Secretary of Interior, returning undisposed of opened lands to "the existing reservation." 10 Fed. Reg. 12409. The Secretary's uniform recognition of reservation status is entitled to weight. *Mattz, supra,* 412 U.S. at 505.

regarding state civil jurisdiction over Indians on the Reservation. It may be appropriate to remand the case for consideration of that issue if the Court concludes that the Reservation continues undiminished. We think, however, that the State of Utah plainly lacks civil jurisdiction over Indians for acts occurring within the boundaries of the Reservation.

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789.[14] In Public Law 280, Congress provided that a State could assume civil jurisdiction over Indians within Indian County,[15] but only with the consent of the affected tribe. Act of August 15, 1953, 67 Stat. 588, as amended, 82 Stat. 78, 25 U.S.C. 1321 *et seq.*[16] Without proper compliance with Public Law 280, a State may not assert its judicial power over Indians for events occurring within a reservation. *Kennerly* v. *District Court*, 400 U.S. 423, 424-425. The Ute Tribe has never given its consent to state jurisdiction.

This Court has also stated that, "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them" (*Williams* v. *Lee*, 358 U.S. 217, 220). In our view, this is a question that the Court

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[14]Utah, in the enabling statute permitting its entrance into the Union, expressly agreed that Indian lands would remain under the control and jurisdiction of the United States. Utah Enabling Act, 28 Stat. 108. See also Utah Constitution, Art. III, Sec. 2.

[15]The definition of "Indian country," contained in 18 U.S.C. 1151, applies also to questions of civil jurisdiction. *DeCoteau, supra*, 420 U.S. at 427.

[16]Utah passed a statute obligating itself to assume jurisdiction but, recognizing the provision of Public Law 280, conditioned jurisdiction on receiving Indian consent. Utah Code Ann. §§63-36-9, 10 (1953).

would not reach because Public Law 280 is a "governing Act[] of Congress," and compliance with its terms is essential. But even aside from Public Law 280, tribal Indians should not be subjected to state court jurisdiction for torts or other occurrences within the boundaries of the Reservations, a process which would definitely impede "the right of reservation Indians to make their own laws and be ruled by them." See, *e.g.*, *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 690; *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 179; *Fisher* v. *District Court*, 424 U.S. 382, 386.

The Ute Tribe has now provided a forum for a civil cause of action by a non-member against members.[17] Cf. *Schantz* v. *White Lightning*, 502 F. 2d 67, 68-70 (C.A. 8). The Due Process Clause does not forbid limiting a non-Indian's reservation-connected cause of action to a hearing in tribal court. *Morton* v. *Mancari*, 417 U.S. 535, 552-555; *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463.

3. Finally, contrary to what may be inferred from the opinion of the Utah Supreme Court, the grant of citizenship to Indians does not in itself subject them to state law or erode the special rights long accorded Indians and Indian tribes. *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 172-173. The Ute Tribe's power to regulate its internal affairs within the Uintah and Ouray Reservation, as an exercise of its independent tribal authority, forecloses the State of Utah from asserting jurisdiction over Indians within reservation boundaries. See *United States* v. *Mazurie*, 419 U.S. 544, 557.

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[17]The Ute Tribe's Law and Order Code, Section 1-2-3, Personal Jurisdiction, asserts jurisdiction over any person "residing, located or present within the Reservation for (i) Any civil cause of action * * *." This section was enacted after the present suit was commenced.

CONCLUSION

This Court should treat the papers as a petition for a writ of certiorari, grant the petition, vacate the judgment of the Utah Supreme Court, and remand the case for reconsideration in light of the decision in *Rosebud Sioux Tribe* v. *Kneip*, No. 75-562, decided April 4, 1977.

Respectfully submitted.

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